CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,879)

(36,879)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, fifth circuit	a	1
Caption (omitted in printing)	a	
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	3
Exhibit "A"—Notice of deficiency	8	6
Amended petition	11	8
Answer to amended petition	18	10
Amended answer to amended petition	19	11
Findings of fact and opinion, Trammell, J.	21	12
Order correcting report	34	23
Decision	34	23
Petition for review	36	24
Assignment of errors	38	26
Praecipe for transcript of record	39	27
Certificate of clerk (omitted in printing)	41	
Argument and submission (omitted in printing)	42	
Opinion, Foster, J.	43	28
Judgment	48	31
Clerk's certificate (omitted in printing)	49	
Order allowing certiorari	50	32

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1932

[fols. a-c] [Caption omitted]

[fol. 1]

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 40636

PINELLAS ICE & COLD STORAGE CO., Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For petitioner: Edward C. Lake, Esq., A. L. Hopkins, Esq., Chas. D. Hamel, Esq., Benj. H. Saunders, Esq., Walter A. Cooper, Esq., John Enrietto, Esq.
For respondent: F. R. Shearer, Esq.

DOCKET ENTRIES

1928.

Sept. 14. Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 15. Copy of petition served on General Counsel.

Oct. 30. Motion for order to show cause filed by General Counsel.

Nov. 3. Copy of motion served on taxpayer. Hearing date set for Nov. 21, 1928.

Nov. 14. Notice of appearance of Chas. D. Hamel, Benj. H. Saunders and John Enrietto as counsel for taxpayer filed.

Nov. 21. Hearing had before Mr. Littleton on respondent's motion. Petition to be amended as to verification and show appeal by officers as trustees in dissolution of dissolved corporation. 30 days to amend.

[fol. 2]

Nov. 21. Order giving petitioner 30 days to file amended petition—respondent usual time to answer, entered.

1928.

Dec. 14. Order giving petitioner until Jan. 21, 1929, file amended petition—respondent usual ti to answer entered.

1929.

Jan. 19. Motion for a continuance of 30 days to ame petition filed by taxpayer. 1/21/29 grant

Feb. 20. Motion for extension of 15 days to file amend petition filed by taxpayer. 2/21/29 grant

Mar. 7. Amended petition filed by taxpayer.

Mar. 8. Copy of amended petition served on Gene Counsel.

Apr. 26. Answer to amended petition filed by Gene Counsel.

Apr. 30. Copy of answer served on taxpayer—Gene Calendar.

Dec. 6. Hearing set Feb. 27, 1930.

1930.

Feb. 26. Notice of appearance of Edward C. Lake as cou sel for taxpayer filed.

Feb. 27-28. Hearing had before Chas. M. Trammell, Div sion 2, on merits. Petitioner given 30 da for original brief; respondent 15 days f reply and 15 days to petitioner to reply respondent's brief.

Feb. 28. Amended answer to amended petition filed General Counsel.

Mar. 4. Transcript of hearing of Feb. 27 and 28, 193 filed.

Mar. 25. Motion for extension to April 10, 1930, to fi brief filed by taxpayer. 3/25/30 granted.

[fol. 3]

Apr. 7. Brief filed by Taxpayer. 4/9/30 copy served General Counsel.

Apr. 22. Brief filed by General Counsel.

May 2. Reply brief filed by taxpayer. 5/3/30 cop served on General Counsel.

Nov. 24. Findings of fact and opinion rendered—Chas. Trammell, Division 2. Judgment will be e tered under Rule 50.

Dec. 8. Motion to enter order approving deficiency as d termined by Commissioner filed by Genera Counsel.

1930.
Dec. 16. Hearing set Jan. 7, 1930, under Rule 50.
Dec. 18. Order correcting report promulgated Nov. 24, 1930, entered.
1931.
Jan. 7, Hearing had before Mr. Trammell on settlement under Rule 50. Proposed order submitted.
Jan. 9. Decision entered—Chas. M. Trammell, Division 2.
July 3. Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.
July 3. Proof of service filed.
July 29. Agreed præcipe filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION, AUGUST 28, 1928—Filed Sept. 14, 1928

The above-named petitioner hereby petitions for a re-
determination of the deficiency set forth by the Commis-
[fol. 4] sioner of Internal Revenue in his notice of de-
ficiency (IT:AR:A-2:RL-60D) dated July 17, 1928, and, as a basis of its proceeding, alleges as follows:

1. The petitioner is a Florida Corporation with its principal office at St. Petersburg, Florida.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit 'A'") was mailed to the petitioner on July 17, 1928.

3. The taxes in controversy are income taxes for the calendar year 1926 and for Seventy-four Thousand Six Hundred Seventy-three 50/100 Dollars ($74,673.50).

4. The determination of tax set forth in said notice of deficiency is based upon the following error:
(a) The inclusion in income by the Commissioner of a gain upon the disposition of assets by the petitioner.

5. The facts upon which the petitioner relies as the basis for this proceeding are as follows:

(a) The petitioner was engaged in the business of manu facturing and selling ice and its assets consisted mainl of land, buildings, machinery and equipment.

(b) On November 4, 1926, the petitioner made an agree ment with the National Public Service Corporation to se to the latter corporation all of its assets, except one unim proved piece of land.

(c) The sales price of the assets was $1,400,000, of whic $400,000 was to be paid in cash upon the closing date o [fol. 5] the contract and $1,000,000 was to be represente by promissory notes and the notes were to be secured b mortgage bonds or other collateral.

(d) The National Public Service Corporation agreed t cause the formation of a new corporation to be organize under the laws of Florida, to carry out the contract o behalf of the National Public Service Corporation.

(e) A Florida corporation was organized for the fore going purposes under the name of the Florida West Coas Ice Company.

(f) The contract was closed on December 15, 1926. Th petitioner transferred its assets to the Florida West Coas Ice Company and on or about that date received $400,00 in cash and the remainder in promissory notes of th Florida West Coast Ice Company.

(g) On November 18, 1926, the stockholders of the pe titioner ratified the contract of sale and made a forma statement of their desire to dispose of all the petitioner' assets. On December 7, 1926, the directors of the peti tioner ratified the contract and noted the stockholders' de sire to dispose of all the assets. On January 20, 1927, th directors and the stockholders authorized the distributio to the stockholders of the net proceeds of the sale of th petitioner's assets, the distribution of all other earning of the petitioner and the dissolution of the Company.

(h) By the terms of the contract of sale, the petitione agreed to convey its assets without encumbrance or lien.

(i) At the time that the contract was made, the liabili ties of the petitioner for mortgages on the real estate an [fol. 6] for deferred payments on machinery and equip ment were in excess of $400,000.

(j) The cash payment received by the petitioner on ac count of the sales price was expended to cancel the liabili

ties in the nature of liens against the real estate and machinery and equipment.

(k) The promissory notes representing the remainder of the sales price, namely, $1,000,000, were paid by the Florida West Coast Ice Company to the petitioner at various times between January and December, 1927.

(l) The petitioner distributed the proceeds of the sale to its stockholders at various times between January and December, 1927, making the distributions on the same day or immediately after receipt of the payments from the Florida West Coast Ice Company.

(m) The gain derived by the petitioner from the sale of assets, after considering selling expenses, was $552,-144.12.

6. Wherefore, the petitioner prays for relief from the deficiency asserted by the petitioner on the following and each of the following particulars:

(a) That the Board may find that the transaction whereby the petitioner disposed of its assets was a reorganization within the meaning of Section 203, (h) (i) of the Revenue Act of 1926, in that the petitioner disposed of substantially all its properties.

(b) That the Board may find that no gain shall be recognized to the petitioner under the provisions of Section 203, (b) (3), (c) and (c) (1) of the Revenue Act of 1926, in [fol. 7] that the petitioner exchanged its properties for money and securities in pursuance of a plea of reorganization and distributed the proceeds in pursuance of such a plan.

Wherefore, the petitioner prays that the Board may hear and determine its appeal, and the petitioner further prays that the Board may give and grant such other and further relief as the Board may deem fit and proper.

(Signed) Walter A. Cooper, Counsel for Petitioner.

c/o Barrow, Wade, Guthrie & Co., 120 Broadway, New York City.

Duly sworn to by Leon D. Lewis. Jurat omitted in printing.

[fol. 8] EXHIBIT "A" TO PETITION

Treasury Department, Washington

IT:AR:A-2. RL-60D

Jul. 17, 1928.

The Pinellas Ice and Cold Storage Company, 201 Lewis Building, St. Petersburg, Florida.

SIRS: In accordance with the provisions of Section 279 (a) of the Revenue Act of 1926, there has been assessed against you an income and profits tax amounting to $74,673.50 for the taxable year 1926, the details of which are set forth in the attached statement.

In accordance with the provisions of Section 274 (a) of the same Act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully, D. H. Blair, Commissioner, By ——, Deputy Commissioner.

Enclosure: Statement, M. B. S-1.

Statement

IT:AR:A-2. RL-60D

July 17, 1928.

In re The Pinellas Ice & Cold Storage Company, 201 Lewis Building, St. Petersburg, Florida

[fol. 9]

Year.	Deficiency in tax
1925	None
1926	$74,673.50
Total	$74,673.50

1925

No additional tax.

1926

Net income reported on return		$78,365.24
Add:		
1. Organization expense	$992.95	
2. Profit on sale of assets	552,144.12	
		553,137.07
Net Income as Adjusted		$631,502.31

Explanation of Adjustments

1. Organization expense is not an allowable deduction as an expense. See Article 582 Regulations 65.

2. Profit on the sale of capital assets is computed in accordance with Article 1591 of Regulations 69 as follows:

Sale price		$1,400,000.00
Cost:		
Fifth Avenue Plant	$253,275.62	
Old plant, Clearwater	33,564.95	
New plant, Clearwater	151,815.94	
New plant, Largo	121,291.25	
Real estate, Largo	20,726.10	
30th Avenue plant	171,506.42	
30th Avenue, Real estate	10,050.45	
Plant, Safety Harbor	12,500.00	
Total	$720,730.73	

[fol. 10]

Brought Forward		$1,400,000.00
	$720,730.73	
Plant, Tarpon Springs	75,506.99	
Sub-stations	799.99	
Office, furniture and fixtures	3,399.70	
Delivery equipment	33,154.60	
Inventory	1,132.70	
		834,724.71
Gross profit		$565,275.29

Add:		
Profit on Blitch property		3,640.00
Depreciation deducted in 1925		27,521.35
Depreciation deducted in 1926		25,857.48
Total		$625,294.12
Deduct:		
Cost of real estate omitted above	$59,592.57	
Legal expenses	10,072.40	
General sales expense	3,485.03	
		73,150.00
Net profit on sales		$552,144.12

Computation of Tax

Net Income	$631,502.31
Amount of tax at 13½%	85,252.81
Original tax	10,579.31
	$74,673.50

It is held by this office that since the assets of the old corporation were sold to a new corporation, it is not a reorganization as defined by Section 203 of the Revenue Act of 1926.

[fol. 11] Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

MBS-1.

Before United States Board of Tax Appeals

[Title omitted]

Amended Petition—Filed March 7, 1929

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: AR: A-2: RL-60D) dated July 17, 1928, and, as a basis of its proceeding, alleges as follows:

1. The petitioner was a Florida corporation with its principal office at St. Petersburg, Florida. Having been dissolved on or about February 28, 1928, this appeal is brought by the parties in interest, the former directors, who are made trustees under Section 6023 (Compiled General Laws of Florida, 1927) and expressly authorized to sue and be sued on behalf of the dissolved corporation.
[fol. 12] 2. The notice of deficiency is dated, and purports to have been mailed, July 27, 1928.

3. The taxes in controversy are income taxes for the calendar year 1926 in the amount of $74,673.50.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in including in petitioner's taxable income for the calendar year 1926 the amount of $552,144.12 as "Profit on Sale of Assets."

(b) The respondent erred in failing and refusing to find that neither gain nor loss is to be recognized from the transfer of its property to the West Coast Ice Company pursuant to a plan of reorganization, for cash and securities.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Pursuant to a plan of reorganization the petitioner, on November 4, 1926, entered into an agreement with the National Public Service Corporation providing for the organization of a new corporation to acquire the assets of the petitioner, together with those of the Citizens Ice & Cold Storage Company. The Florida West Coast Ice Company was incorporated on or about December 1, 1926, and to it were transferred on December 15, 1926, substantially all the assets of the petitioner, including ice and cold storage plants, machinery, equipment and certain real estate. The petitioner received $400,000 in cash and $1,000,000 in securities of the Florida West Coast Ice Company. Certain liabilities of the petitioner were paid off and the remainder of the proceeds distributed to the stockholders of the petitioner in pursuance of the plan of reorganization.

[fols. 13-17] 6. The petitioner prays for relief from the deficiency asserted by the respondent on the following particular:

(a) That the Board may find that neither gain nor loss is to be recognized upon the transfer of petitioner's assets to the Florida West Coast Ice Company pursuant to a plan of reorganization.

Wherefore, the petitioner prays that the Board may hear and determine its appeal, and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board shall find that the petitioner has overpaid its taxes for the years under review, the Board may order and direct refund of said taxes overpaid with interest thereon.

Charles D. Hamel, Richard S. Doyle, Edward H. McDermott, Benjamin H. Saunders.

Duly sworn to by John S. Taylor et al. Jurats omitted in printing.

[fol. 18] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed April 26, 1929

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the amended petition of this taxpayer admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Denies the allegations contained in paragraph 2 of the amended petition.

[fol. 19] 3. Admits that the taxes in controversy are income taxes for the calendar year 1926, as alleged in paragraph 3 of the amended petition.

4. Denies the allegations of error set forth in paragraph 4 of the amended petition.

5. Admits that all the assets of the petitioner, including ice and cold storage plants, machinery, equipment and certain real estate, were disposed of during 1926, and that the petitioner received therefor $400,000 in cash and $1,000,000.00 in securities of the Florida West Coast Ice Company, as alleged in subparagraph (a) of paragraph 5 of the amended petition, but denies all other allegations of fact contained in the said subparagraph.

Denies each and every allegation of fact contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the amended petition be dismissed and the appeal denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: F. R. Shearer, Special Attorney, Bureau of Internal Revenue.

BEFORE U. S. BOARD OF TAX APPEALS

AMENDED ANSWER TO AMENDED PETITION—Filed at hearing Feb. 28, 1930

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of [fol. 20] Internal Revenue, and for amended answer to the amended petition of this taxpayer admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits that the notice of deficiency was mailed July 17, 1928.

3. Admits that the taxes in controversy are income taxes for the calendar year 1926, as alleged in paragraph 3 of the amended petition.

4. Denies the allegations of error set forth in paragraph 4 of the amended petition.

5. Admits that certain assets of the petitioner, including ice and cold storage plants, machinery, equipment and cer-

tain real estate, were sold during 1926 for the sum of $1,400,000 payable $400,000 in cash and the balance as follows: $500,000 on or before the 31st day of January, 1927, $250,000 on or before the first day of March, 1927, and $250,000 on or before the first day of April, 1927, the deferred installments of the purchase price above mentioned to be evidenced by 6% notes of the Florida West Coast Ice Company payable on or before the dates specified, and that during 1926 the petitioner received $400,000 in cash and $1,000,000 in promissory notes of the Florida West Coast Ice Company. Denies all other allegations of fact contained in sub-paragraph (a) of paragraph 5 of the amended petition.

Denies each and every allegation of fact contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

[fol. 21] Wherefore, it is prayed that the Commissioner's determination be approved and that the amended petition be dismissed and the appeal denied.

C. M. Charest, R. S., General Counsel, Bureau of Internal Revenue. Of Counsel: F. R. Shearer, Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

21 B. T. A., —. Docket No. 40636

Pinellas Ice & Cold Storage Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Promulgated November 24, 1930

Held that the petitioner sold its assets for cash paid and to be paid in the future and the transaction does not come within the reorganization provisions of the Revenue Act of 1926 relating to exchanges.

E. C. Lake, Esq., and A. L. Hopkins, Esq., for the petitioner.

F. R. Shearer, Esq., for the respondent.

Findings of Fact and Opinion

This is a proceeding for a redetermination of a deficiency in income tax for 1926 in the amount of $74,673.50. The sole question is whether any taxable gain was realized by [fol. 22] petitioner from the transfer of its property to the Florida West Coast Ice Company in 1926. If there was taxable gain there is no controversy as to the amount.

Findings of Fact

Petitioner was incorporated under the laws of Florida in January, 1925, and was thereafter engaged in the business of the manufacture and sale of ice in and around St. Petersburg, Florida. Substantially the same stockholders owned and controlled the Citizens Ice and Cold Storage Company, hereinafter called Citizens Company, a corporation engaged in the same business in the same locality.

In February, 1926, negotiations were begun by Leon D. Lewis, the general manager of both of the above companies, for the disposition of the business and property of the two companies to the National Public Service Corporation, which was a holding company for certain interests of A. E. Fitkin of New York. These negotiations continued through the summer of 1926. The Fitkin interests desired to acquire the business of both companies, but were unwilling to consider the acquisition of one without the other. All the directors and stockholders of both companies were anxious to dispose of all the properties of the two companies, and upon the disposal of the properties to discontinue business, dissolve the corporations, and distribute the proceeds. The progress of the negotiations with the National Public Service Corporation was reported by Leon D. Lewis from time to time to the directors and stockholders of petitioner and Citizens Company and was discussed by the stockholders and directors of these companies. Of the fifteen stockholders of petitioner, ten of them, owning over 80 per cent of its stock, were also directors. All lived in St. Petersburg or the [fol. 23] immediate vicinity, and Lewis was in constant touch with them during all of the negotiations with the Fitkin interests. It was definitely understood and agreed by all of the stockholders and directors that upon the making of the transfer of the properties, the affairs of the two corpo-

rations would be wound up, the assets distributed to the stockholders in liquidation, and the corporations dissolved. In October, 1926, the representative of the National Public Service Corporation and the representatives of petitioner and of Citizens Company reached an agreement as to the consideration and the terms of the transfer of the properties of the two companies. In October, 1926, the directors of petitioner and the Citizens Company met and unanimously approved the terms of the agreement with the National Corporation, and at that time confirmed their prior agreements and understandings that the proceeds of the transfer would be distributed and the corporations dissolved.

On November 4, 1926, a written agreement was entered into between petitioner and the National Public Service Corporation relating to the terms of the transfer of petitioner's property and conditioned upon the transfer of the property of Citizens Company, as follows:

Agreement made this 4th day of November, 1926, by and between Pinellas Ice & Cold Storage Company, a Florida corporation, hereinafter sometimes called the 'Vendor', party of the first part, and National Public Service Corporation, a Virginia corporation, hereinafter sometimes called the 'Purchaser', party of the second part,

Witnesseth:

First. The Vendor agrees to sell and the Purchaser agrees to purchase all of the real estate set forth in Schedule A hereto annexed, together with all physical property, [fol. 24] plants, buildings, equipment, generators, machinery, distribution systems, supplies, rights, easements and privileges, and all other property, other than real estate not described in Schedule A, cash on hand, accounts and bills receivable, and books of account, now owned or used by the Vendor in connection with its ice or cold storage business or which may hereinafter be acquired prior to the closing of this contract, together with the goodwill of the business, free and clear of all defects, liens, encumbrances, taxes and assessments for the sum of $1,400,000, payable as hereinafter provided.

Second. The Vendor further agrees to assign to the Purchaser (1) its contract with Wright Brothers in con-

nection with the latter's ice business at Dunodin; (2) its lease with Pinellas County Power Company of the building in Clearwater in which the old ice plant is located; and (3) its power contract with Pinellas County Power Company.

Third. The date and place of closing and terms of settlement are as follows:

(a) The date of closing shall be at eleven o'clock A. M. on December 15, 1926, and the place of closing at the office of A. E. Fitkin & Company, 165 Broadway, New York City.

(b) At said time and place the Vendor shall deliver to the Purchaser instruments of conveyance and transfer by general warranty in form satisfactory to the Purchaser of the property set forth in paragraphs First and Second hereof.

(c) At said time and place the Purchaser shall pay to the Vendor the sum of $400,000.00 in cash. The balance of the purchase price, to-wit: $1,000,000.00 shall be paid by the Purchaser to the Vendor as follows:

[fol. 25] $500,000.00 on or before the 31st day of January, 1927;

$250,000.00 on or before the 1st day of March, 1927; and

$250,000 on or before the 1st day of April, 1927.

The deferred installments of the purchase price above mentioned shall be evidenced either:

(a) By 6% notes of the Purchaser payable on or before the dates above specified and secured by the deposit thereunder as collateral of either (1) notes and/or mortgage bonds of the proposed Florida corporation referred to in article Fourteenth hereof not less in aggregate principal amount than the notes of the Purchaser given to the Vendor; or (2) other collateral satisfaction to the Vendor; or

(b) By 6% notes of the proposed Florida corporation referred to in article Fourteenth hereof, payable on or before the dates above specified, and secured by the deposit thereunder as collateral of either (1) mortgage bonds of such Florida corporation ot less in aggregate principal amount than the notes of the Florida corporation given to the Vendor; or (2) other collateral satisfactory to the Vendor.

In case mortgage bonds of such proposed Florida corporation are deposited as collateral to notes as above provided for, such mortgage bonds shall have a first lien on the property and assets covered by this agreement.

Tenth. The Vendor agrees that it will procure for the Purchaser an agreement to be signed by E. T. Lewis and Leon D. Lewis to the effect that they will not engage, di- [fol. 26] rectly or indirectly, in the manufacture or sale of ice or refrigeration in Pinellas County, Florida, for a period of ten years from the date of closing of this agreement.

Thirteenth. In the event that Citizens Ice & Cold Storage Company is unable for any reason to fulfill its covenants and agreements under a contract between it and the Purchaser, bearing even date herewith, then the Purchaser, at its option, shall be released from its covenants and agreements herein set forth without claim of any sort on the part of the Vendor for damages or otherwise. If Citizens Ice & Cold Storage Company is able to fulfill its covenants and agreements under said contract of even date herewith but the Purchaser fails to fulfill or perform the covenants and agreements on its part contained in said contract with Citizens Ice & Cold Storage Company of even date herewith, then the Vendor shall be released from its covenants and agreements herein set forth without claim of any sort on the part of the purchaser for damages, or otherwise.

Fourteenth. Unless the Purchaser determines to cancel this agreement and not to purchase the property and assets covered hereby as hereinbefore provided, the Purchaser agrees to cause the formation of a corporation under the laws of the State of Florida and to cause such corporation to take title to the property and assets covered hereby and assume the covenants and agreements on the part of the Purchaser contained herein, but in such event the Purchaser shall remain liable for the performance by such Florida corporation of the covenants and agreements herein contained.

Schedule A of the agreement listed the tracts of real estate upon which petitioner's plants and buildings were located, and Schedules B and C listed the liens and encumbrances upon the real estate, plants, and equipment.

[fol. 27] The $400,000 cash payment provided for in the agreement was determined as the amount necessary to dis-

charge all debts and liens and encumbrances on the property of petitioner.

On the same date, November 4, 1926, an agreement of similar import with respect to the property of Citizens Company was entered into between that company and the National Public Service Corporation. Paragraph sixteenth thereof was similar to Paragraph Thirteenth of the agreement with Petitioner and provided that the consummation of the transfer would depend upon the corresponding transfer of petitioner's property.

At the request of the National Public Service Corporation, the stockholders and directors of petitioner and the Citizens Company approved the two agreements. This was done at the same time and place on December 7, 1926, and for the purpose of effectively passing title to the properties of the two companies.

Early in December, 1926, $33,000 was advanced on behalf of the National Public Service Corporation to petitioner for the purpose of retiring a like amount of outstanding bonds of petitioner. These bonds were part of an issue of $300,000, of which only $33,000 were outstanding. Petitioner paid over this amount to the trustee under the bond issue and subsequently the entire amount of bonds of this issue was canceled and destroyed.

Pursuant to the agreement, National Public Service Corporation caused to be incorporated the Florida West Coast Ice Company, and a charter to the latter company was granted on December 6, 1926.

On December 17, 1926, Lewis on behalf of petitioner and Citizens Company, met with the representatives of National Public Service Corporation and the Fitkin interests in New York City for the purpose of closing the transactions. There [fol. 28] were also present representatives of creditors of petitioner, whose claims were to be satisfied out of the cash payment provided for in the agreement of November 4, 1926. At this meeting deeds and other instruments of conveyance to the property of petitioner and Citizens Company, respectively, were delivered to the Fitkin representatives. These instruments were made out to Florida West Coast Ice Company. Checks of the Fitkin interests were made out and delivered to the respective creditors of petitioner and Citizens Company. Approximately $91,000 was

thus paid to take up the deferred payment notes of Arctic Ice Machine Company and $135,000 to take up the mortgage notes held by Central National Bank and Trust Company of St. Petersburg. A cash payment of approximately $137,000 was also made to petitioner. These payments to petitioner and its creditors, together with the advance of $33,000 previously made to take up outstanding bonds of petitioner, made up the cash payment of $400,000 provided for in the agreement of November 4, 1926. Petitioner also received at this time, pursuant to the agreement, four notes of Florida West Coast Ice Company, in the respective amounts of $500,000, $250,000, $150,000, and $100,000, maturing serially from January 31, 1927, to April 1, 1927. The note of $100,000 was conditioned as to payment upon petitioner removing a cloud upon the title to one of its plants. As collateral security for these notes there were deposited bonds of Florida West Coast Ice Company which were secured by the properties thus acquired by that company from petitioner and Citizens Company. The agreement of November 4, 1926, made by Citizens Company was likewise carried out according to its terms at the same time.

The cash payment received by petitioner on December 17, 1926, amounting to approximately $137,000, was immediately used by petitioner to take up notes at banks and to pay off other liabilities, and virtually all of this sum was thus paid out by petitioner before January 20, 1927.

[fol. 29] On January 20, 1927, pursuant to the plan theretofore made by the stockholders and directors of petitioner, formal resolutions were passed providing for the winding up of the affairs of the corporation, distribution of the assets and the dissolution of the corporation. As stated, similar action was taken by Citizens Company at the same time.

The notes of Florida West Coast Ice Company were paid on or before the respective due dates, thereof, except the $100,000 note, which was paid in November, 1927, after the flaw in title to one of petitioner's plants had been cleared up. Upon receiving payment of these notes, petitioner immediately distributed the proceeds to its stockholders as liquidating dividends. The outstanding certificates of shares of stock of petitioner had been surrendered prior to the distributions in liquidation and remained in the custody of the company thereafter. Indorsements of the payment

of liquidating dividends were made upon the several certificates. Pursuant to the resolution of January 20th, a small amount of cash was retained as a contingent fund for possible expenses.

The property conveyed to the Florida West Coast Ice Company pursuant to the contract of November 4, 1926, covered all of the assets of petitioner except a few scattered vacant lots which were worth not in excess of $10,000; some accounts receivable from customers which did not exceed $3,000 in face value, and a small amount of cash on hand. The original plan of the directors and stockholders of petitioner provided that any miscellaneous items of assets of the company which would not be disposed of to the Fitkin interests would be turned over to a new holding company to be organized for that purpose. In pursuance of this plan Citizens Holding Corporation was organized early in 1927, and all of the remaining assets of petitioner, except what was to be retained to meet debts and contingent liabilities, were thereupon turned over to Citizens [fol. 30] Holding Corporation as trustee for petitioner's stockholders. The value of the assets so retained and conveyed to Citizens Holding Corporation was less than 1 per cent of the value of the entire assets of petitioner. In other words, more than 99 per cent of the value of the total property was transferred to the Florida West Coast Ice Company.

The transfer of the assets of petitioner to the Florida West Coast Ice Company in exchange for cash and notes, the distribution in liquidation of the proceeds thereof to the stockholders of petitioner, and the dissolution of petitioner were made in accordance with and pursuant to a plan of the officers and stockholders of petitioner, which plan was formulated prior to the execution of the agreements of November 4, 1926, between Citizens Ice & Cold Storage Company and National Public Service Corporation.

The respondent, in determining the deficiency set forth in the notice of deficiency to petitioner, held that petitioner had realized a taxable profit of $552,144.12 from the transaction.

The income-tax return of petitioner for the year 1926 was filed with the Collector of Internal Revenue at Jacksonville, Florida.

Opinion

TRAMMELL:

It is the contention of the petitioner that the transaction here involved comes within the reorganization provisions of the Revenue Act of 1926 and that, the proceeds of the sale or transfer having been distributed pursuant to a plan of reorganization, there was no taxable gain.

The pertinent provisions of the statute are:

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

[fol. 31] and the following subdivisions of section 203: (b) (3); (d) (1); (e) (1) and (2); (f); (g); and (h) (1) and (2).

Section 203 (a) provides that when there is a sale or exchange of property the entire amount of the gain or loss shall be recognized, with certain exceptions mentioned in the other subdivisions of that section. The question for decision is whether the transaction here comes within any of those exceptions.

Generally, upon the sale or exchange of property taxable gain or loss is recognized. This is true unless the transaction comes within an exception contained in the statute. So far as the provisions of the statute pertinent here are concerned, section 203 (b) (3) and 203 (e), the exception relates to exchanges and not to sales. Section 203 (b) (3) provides that no gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, under the circumstances therein provided, and section 203 (e) provides that if an exchange would be within the provision of paragraph (3) of subdivision (b) if it were not for that fact that money or other property were included in the transaction as a consideration. In other words, in order to come within the exception to the general provisions contained in section 203 (e) there must in the first place clearly be an exchange. This essential requirement must be met in any event, regardless of whether otherwise there might be a reorganization within the meaning

of the statute or whether the other provisions of the statute have been met. We think it is clear*ly* that if property is sold the transaction would not come within the exchange provisions. A sale does not come within either the words or the reason of section 203 (b) (3) or 203 (e). There is a clear legal distinction between a sale and an exchange, and sections 203 (a) (3) and 203 (e) relate only to exchanges, and not to sales.

[fol. 32] The United States Supreme Court has laid down a rule long recognized and well established in law as to what constitutes a sale. That Court in the case of Williamson v. Berry, 8 How. 495, 543, stated as follows:

> * * * we remark that sale is a word of precise legal import, both at law and in equity. It means at all times, a contract between parties, to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought. Noy's Max., ch. 42; Shep. Touch., 244.

Congress should be presumed to have had a knowledge of the law as laid down by the Supreme Court and long recognized as to what constitutes a sale, and we must assume that the language used in section 203 was used with that import, especially since the section of the statute involved used both the words "sale" and "exchange" and did not include sales in the exceptions.

Here the transaction was a sale for money. The consideration was to be paid only in money. A portion of the consideration was to be paid in cash and the balance to be paid in the future in money. This to our mind constitutes a real sale of assets rather than an exchange as provided in section 203 (b) (3), 203 (c) or 203 (e) (1).

The notes, although secured by a mortgage, were merely evidences of the payments to be made in the future. It is well recognized that even in the absence of a definite agreement that promissory notes are not to be considered as payments, but merely as evidences of agreement to pay in the future. But in this case we have not only the presumption of law, but the actual agreement of the parties, that the deferred payments were evidenced by notes. Lyman v. United States Bank, 12 How. 225; Peter v. Beverly, 10 [fol. 33] Pet. 532; United States Bank v. Daniel, 12 Pet.

32; King v. McConnell, 57 Fla. 77, 49 So. 539; Our Home Life Ins. Co. v. Peacock, 71 Fla. 35, 70 So. 775; Peacock v. Our Home Life Ins. Co., 73 Fla. 1207, 75 So. 799.

It may well be true that promissory notes secured by the property to be acquired in the transaction may be considered as securities, but the other provisions in the statute must first be met; in other words, there must be an exchange, and when we consider the import to be given to that word, it must necessarily limit the word "securities" as well. When we consider that the statute makes no exception from the general rule as to the taxation of gain derived from sales, but only makes exception as to exchanges in section 203 (a) (3) and 203 (e), we think that the word "securities" does not mean promises of purchase price payments to be made in the future evidenced by notes, although secured by mortgages. The statute clearly contemplated something else than purchase price obligations in these provisions of the statute.

There is no exception to the general rule of taxation where a corporation, although a party to a reorganization, sells its property for money paid in cash or to be paid in cash, although the deferred payments are evidenced by purchase price promissory notes secured by mortgage. Even if we should hold that there was a reorganization in every sense of the word, the petitioner has not brought itself within the exceptions contained in the statute. Considering for the sake of argument that there was a reorganization and that the petitioner involved here was a party to that reorganization, still the petitioner did not exchange property as provided in section 203 (b) (3) or 203 (e). The petitioner simply sold its property for money paid in cash or to be paid in cash.

In view of the foregoing, the transaction not being an exchange, it is unnecessary for us here to discuss or to decide whether there was a reorganization, whether the peti- [fol. 34] tioner here was a party to the reorganization, or whether the petitioner made a distribution in pursuance to a plan of reorganization.

Reviewed by the Board.

Judgment will be entered under Rule 50.

BEFORE U. S. BOARD OF TAX APPEALS

ORDER CORRECTING REPORT

For cause appearing of record, it is

Ordered, that the report and determination in the above entitled proceeding promulgated under date of November 24, 1930, be amended at page 9, second paragraph, by adding after the date November 4, 1926, the words "between petitioner and National Public Service Corporation, and".

(Signed) Charles M. Trammell, Member.

Dated December 18, 1930. RTC:mvw.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 40636

PINELLAS ICE & COLD STORAGE COMPANY, a Dissolved Corporation, by John S. Taylor, M. W. Ulmer, Leon D. Lewis, Ed. T. Lewis, Henry Sorenson, E. E. Duncan, Chester B. McMullen, Harry D. Ulmer, Roland J. Ulmer, John S. Taylor, Jr., Former Directors of the said Corporation, as Trustees, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

This proceeding came on for hearing January 7, 1931, on respondent's motion in lieu of Rule 50 settlement, filed De- [fol. 35] cember 8, 1930, both parties being represented by counsel. It appears that the proceeding was instituted before the Board September 14, 1928, by the filing of a petition for redetermination in the name of Pinellas Ice & Cold Storage Company, the appeal being taken from the Commissioner's deficiency notice dated July 17, 1928, notifying the taxpayer of the making of a jeopardy assessment, under Section 279 (a) of the Revenue Act of 1926, of a deficiency in Federal income tax amounting to $74,673.50 for the year 1926. Before issue was joined an amended petition was filed March 7, 1929, pursuant to leave granted by the Board

by orders dated November 21, 1928 and December 14, 1928, which amended petition was in the name of said taxpayer as a dissolved corporation by its former directors as trustees and was captioned as above. After answer was filed and due hearing held the Board under date of November 24, 1930, promulgated its report which was corrected by order dated December 18, 1930, and as corrected directed the entry of judgment under Rule 50. By the afore-mentioned motion filed December 8, 1930, respondent moved for the entry of an order approving the deficiency as determined by the Commissioner for the reason that the Board's report made no change in the tax liability of the taxpayer for the year in question, although it was admitted in said motion that since the Board's report of November 24, 1930, namely, on December 1, 1930, the amount of the deficiency determined by the Commissioner had been paid.

Upon consideration of the record herein, and pursuant to the Board's report of November 24, 1930, as corrected by order dated December 18, 1930, it is hereby

Ordered and decided that the correct amount of the deficiency in Federal income tax which should have been as-
[fol. 36] sessed against Pinellas Ice & Cold Storage Company for the calendar year 1926 is $74,673.50 as determined by the Commissioner.

(Signed) Charles M. Trammell, Member United States Board of Tax Appeals.

In United States Circuit Court of Appeals, Fifth Circuit

Petition for Review—Filed July 3, 1931

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your above named petitioner respectfully shows:

I

This is a proceeding for review by the United States Circuit Court of Appeals for the Fifth Circuit of a decision of the United States Board of Tax Appeals, entered on January 9, A. D. 1931, redetermining a deficiency in corporation income tax for the calendar year 1926 in the amount of $74,673.50.

II

Petitioner was a corporation organized under the laws of Florida, with its principal office at St. Petersburg, Florida, dissolved on or about February 28, 1928. This proceeding is brought on behalf of the corporation by the individuals who were Directors of said corporation at the time of dissolution, who are Trustees for said corporation by virtue of Section 6025 of the Compiled General Laws of Florida, [fol. 37] 1927, and who are authorized to maintain suits on behalf of the dissolved corporation. The income tax return of petitioner, Pinellas Ice & Cold Storage Company for the calendar year 1926 was filed with the Collector of Internal Revenue at St. Petersburg, Florida.

III

The nature of the controversy is as follows:

Petitioner prior to December 15, 1926, was engaged in the business of manufacturing and selling ice. On November 4, 1926, pursuant to a plan of reorganization, it entered into an agreement with the National Public Service Corporation, providing for the organization of a new corporation to acquire the assets of petitioner and, also, of the Citizens Ice & Cold Storage Company. The proposed new corporation was incorporated on or about December 1, 1926, under the name of Florida West Coast Ice Company, and to it were transferred on December 15, 1926, substantially all the assets of petitioner. Petitioner received $400,000 in cash and $1,000,000 in securities of the new corporation, Florida West Coast Ice Company. Certain of petitioner's liabilities were discharged, and the remainder of the proceeds were distributed to petitioner's stockholders in pursuance of the reorganization plan.

The petitioner treated the reorganization as a nontaxable transaction and reported no profit thereon. The Commissioner of Internal Revenue determined that the transaction was taxable and assessed a deficiency against petitioner for the calendar year 1926 in the amount of $74,673.50, which amount, together with interest thereon as provided by law, was paid to the Collector of Internal Revenue at St. Petersburg, Florida, prior to the filing of this Petition for Review. The United States Board of Tax

Appeals, on appeal from the determination of the Commis-
[fol. 38] sioner of Internal Revenue by petitioner, sustained the action of the Commissioner of Internal Revenue and redetermined the deficiency herein complained of.

IV

The United States Board of Tax Appeals committed the following errors upon which petitioner relies as the basis of this proceeding:

(1) The Board of Tax Appeals erred in including in petitioner's taxable income for the year 1926 the amount of $552,144.12 as profit on the transfer of its assets to Florida West Coast Ice Company.

(2) The Board of Tax Appeals erred in failing and refusing to find that neither gain nor loss is to be recognized on the transfer of petitioner's property to the Florida West Coast Ice Company, pursuant to a plan of reorganization, for cash and securities.

(3) The Board erred in not holding, as a matter of law, that the transfer of petitioner's assets to the Florida West Coast Ice Company and the receipt by it of cash and securities, and the distribution of the proceeds thereof to the stockholders of petitioner, pursuant to a plan of reorganization, was a transaction or reorganization upon which no gain or loss would be recognized under the provisions of Section 203 of the Revenue Act of 1926.

Wherefore your petitioner prays that this Court may review the findings of fact, opinion and order of redetermination of the Board of Tax Appeals in this cause and reverse the decision of said Board because of the errors aforesaid, and direct said Board to redetermine the deficiency, if any, against the petitioner, in accordance with law and the evidence, and that this Court may grant such [fol. 39] other and further relief as to it may appear proper in the premises.

Respectfully, Albert L. Hopkins, 1 N. LaSalle St., Chicago, Illinois. E. C. Lake, 1150 Munsey Bldg., Washington, D. C., Attorneys for Petitioner.

Duly sworn to by Albert L. Hopkins. Jurat omitted in printing.

Before U. S. Board of Tax Appeals

Præcipe for Transcript of Record—Filed July 29, 1931

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and transmit a transcript of the record in this cause to the Clerk of the United States Cir-
[fol. 40] cuit Court of Appeals for the Fifth Circuit, and include in said transcript copies duly certified as correct of the following documents:

1. The docket entries of proceedings before the Board in the above entitled cause.
2. Pleadings before the Board.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review.
5. Order or orders enlarging the time for the preparation and delivery of the record.
6. This Præcipe.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

A. L. Hopkins, E. C. Lake, Attorneys for Petitioner.

Dated this 29th day of July, A. D. 1931.

The respondent agrees that the transcript of record designated in the foregoing Præcipe is a complete record for the review of this cause and that said record may be prepared and transmitted without further notice to the respondent.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Dated this 29th day of July, A. D. 1931.

[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] Minute entry of argument and submission, February 24, 1932, omitted in printing.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6347

PINELLAS ICE & COLD STORAGE COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the United States Board of Tax Appeals (District of Florida)

(March 29, 1932)

Before Bryan, Foster and Walker, Circuit Judges

OPINION OF THE COURT—Filed March 29, 1932

FOSTER, Circuit Judge:

In December 1926, petitioner, the Pinellas Ice & Cold Storage Co., a Florida corporation, disposed of substantially all its property to another corporation. Treating the transaction as a reorganization of the company, in making returns for 1926, petitioner assumed that, under the provisions of Sec. 203, Revenue Act of 1926, no taxable profit had been derived from the transfer. The Commissioner of Internal Revenue disagreed with this and determined that a taxable profit of $552,144.12 had resulted from a sale of assets. A deficiency of $74,673.50 was assessed. On appeal, the Board of Tax Appeals held that the transaction was a sale and affirmed the Commissioner. 21 B. T. A. 425. The findings of facts by the Board are not excepted to. We [fol. 44] may refer to them for the facts in detail.

It appears that petitioner and another corporation, the Citizens' Ice and Cold Storage Co., were engaged in the business of manufacturing and selling ice, in the vicinity of St. Petersburg, Florida. They had substantially the same stockholders and the same general manager, Leon D. Lewis. In February, 1926, negotiations were begun through Lewis with the National Public Service Corporation, a holding company for what was called the Fitkin interests, for the disposition of the business and property of both companies.

These negotiations culminated in separate written agreements, executed on November 4, 1926, for the sale of the properties to a corporation to be created.

The new company, called the Florida West Coast Ice Co., was formed. On December 17th, 1926, substantially all the assets of petitioner were deeded to the new company for $1,400,000, payable $400,000 cash and the balance represented by four notes for the respective amounts of $500,000, $250,000, $150,000 and $100,000, payable serially from January 31, to April 1, 1927. Bonds of the new company were deposited as collateral security for these notes. A similar transaction was had with the Citizens' Ice Co. All of the cash payment went to pay creditors. The notes were paid on or before their due dates, except the note for $100,000, which was not paid until November 1927. As the notes were paid, in accordance with resolutions for the dissolution of petitioner, the proceeds were distributed to its stockholders as liquidating dividends, which were endorsed on the stock certificates that had been previously turned over to petitioner. Only a small amount of cash was retained for contingent expenses. A holding company was organized and the assets not disposed of, about one per cent, were transferred to it as trustee. It is not shown that the stockholders of either petitioner or the Citizens' Company had any interest in the Florida West Coast Ice Company before or after the transfer.

Relying on the provisions of Sec. 203, paragraphs [fol. 45] (b)(3)-(e) (1) and (h)(1)(A) of the Revenue Act of 1926, it is contended by petitioner: that there was a reorganization to which petitioner and the West Coast Co. were parties; that the notes were securities of the new company; that there was an exchange of the property of petitioner for cash and securities; that this was distributed in pursuance of a plan of reorganization; and that therefore no gain to the corporation should be recognized.

Apparently there are no decisions in point and it would be useless to review the cases cited by either side.

Section 203 appeared first in the 1924 Revenue Act. As it is readily available, we need not burden the opinion by setting it out in full. Prior thereto the profit resulting from all exchanges of property was taxable. It is evident that in enacting Sec. 203 Congress intended to exempt from

consideration for either profit or loss transfers of property which were really exchanges of capital assets, and, to a certain extent, to brush aside technicalities in so construing them. It is equally clear that there was no intention to exempt profit arising from an outright sale of property, or an exchange of property, between corporations where there was in fact no reorganization.

There is no doubt that the written agreement of November 4, 1926, for the disposition of petitioner's property to a new corporation, contemplated an outright sale and not an exchange or a reorganization. The conveyance of the property on December 17, 1926, was in form a sale and not an exchange. This is not seriously disputed by petitioner but it is contended that under the definition of paragraph (h) (1) (A) the mere acquisition by the Florida West Coast Ice Co. of substantially all the property of petitioner was a reorganization.

So far as material, Sec. 203 (h), is as follows:

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation [fol. 46] of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, * * *"

As applied to corporations the terms "merger" and "consolidation" have well known legal meanings. While the result is practically the same in either event, there is this difference. In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished. In either event the resulting corporation acquires all the property, rights and franchises of the dissolved corporations and their stockholders become its stockholders. Royal Palm Soap Co. vs. Seaboard Air Line Ry. Co., 296 Fed. 448; Bouvier's Law Dictionary, (3rd Ed.) p. 2202, verbo "merger."

It must be assumed that in adopting paragraph (h) Congress intended to use the words "merger" and "consolidation" in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point.

It follows that there was no reorganization, and consequently no party to a reorganization, in connection with the disposition of petitioner's property. It is unnecessary to pass upon petitioner's other contentions.

[fol. 47] The record presents no reversible error. The petition is denied.

[fol. 48] In United States Circuit Court of Appeals, Fifth Circuit

No. 6347

Pinellas Ice & Cold Storage Co.

versus

Commissioner of Internal Revenue

Judgment—March 29, 1932

This cause came on to be heard on the petition of Pinellas Ice & Cold Storage Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that said petition be, and the same is hereby, denied.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,879. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 182. Pinellas Ice and Cold Storage Company, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1932. File No. 36,879.

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,879. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 182. Pinellas Ice and Cold Storage Company, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1932. File No. 36,879.

FILE COPY

FILED
JUN 27 1932
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ~~SEVENTH~~ FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
1 No. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 0521

INDEX.

PAGE

PETITION 1

Question Presented 2
Statement of Facts 3
Errors Relied Upon 4
Reasons for Granting the Writ 5

BRIEF IN SUPPORT OF THE PETITION 9

Opinions Below 9
Jurisdiction 9
Question Involved 9
Statute Involved 10
Argument 12

CONCLUSION 27

APPENDIX 29

CITATIONS.

CASES:

Commonwealth Commercial State Bank v. Lucas, 41 Fed. (2d) Ill. 26

Cullinan, Appeal of J. S., 5 B. T. A. 996 25

First National Bank v. United States, 283 U. S. 142 23

Foster v. Commissioner, 19 B. T. A. 958 25

Green v. Commissioner, 24 B. T. A. 719 21

Komada v. United States, 215 U. S. 392 26

Meyer, Appeal of Anton M., 3 B. T. A. 1329 25

National Pipe & Foundry Co. v. Commissioner, 19 B. T. A. 242 ..... 21, 26

PAGE

Old Colony Trust Co. v. Commissioner, 279 U. S. 716 9

Parris v. Commissioner, 20 B. T. A. 320 25

Rodenbaugh, Appeal of, 1 B. T. A. 477, 25 Fed. (2d) 13 25

Rusk v. Commissioner, 20 B. T. A. 138 25

Somers Lumber Co., Appeal of, 2 B. T. A. 106..... 25

Tulas Oxygen Co. v. Commissioner, 18 B. T. A. 1283 21

U. S. v. Cerecedo Hermanos y Compania, 209 U. S. 337 26

Williams v. Commissioner, 44 Fed. (2d) 467....6, 13, 22

STATUTES AND REGULATIONS:

Sec. 240(a) Judicial Code 9

Sec. 203 of the Revenue Act of 1926 .....10, 29

Art. 1574, Regulations 65 .....5, 7, 17, 24

Art. 1574, Regulations 69 .....5, 7, 18, 24

BUREAU OF INTERNAL REVENUE RULINGS AND MISCELLANEOUS:

G. C. M. 1753, V-1 C. B., p. 138 21

G. C. M. 2000, VI-2 C. B., p. 248 23

G. C. M. 3291, VII-1 C. B., p. 203 23

G. C. M. 3827, VII-2 C. B., p. 114 .....6, 19

G. C. M. 7472, IX-1 C. B., p. 184 .....6, 19, 20

G. C. M. 8565, IX-2 C. B., p. 127.....6, 19, 20

I. T. 2542, IX-2 C. B., p. 126 .....6, 19, 20

PAGE

Report of the Ways and Means Committee on the Revenue Act of 1924 (Report No. 179, 68th Congress) 7, 16, 24

Report of the Finance Committee of the Senate (Report No. 398, 68th Congress) 7, 17, 24

Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, dated March 6, 1924 ..... 7, 15, 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No.

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari.

Pinellas Ice and Cold Storage Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 29, 1932 (R. 46), reported in 57 Fed. (2d) 188.

This case reached the Circuit Court of Appeals on the petition of Pinellas Ice and Cold Storage Company for a

review of the decision of the United States Board of Tax Appeals in determining a deficiency in income taxes for the year 1926.

Question Presented.

Section 203 of the Revenue Act of 1926 provides that no gain or loss shall be recognized, so far as the corporation is concerned, when a corporation, a party to a reorganization, exchanges property for securities and cash received from another corporation, a party to the reorganization, and these are distributed in pursuance of the plan of reorganization to the stockholders.

A newly formed corporation acquired over 99 per cent of the assets of Petitioner (R. 30) and, likewise, substantially all the assets of another corporation known as Citizens Ice & Cold Storage Company (hereinafter called "Citizens Company"). The acquisition of these two properties was in pursuance of a plan, worked out over a period of months, and two agreements, the carrying out of each of which was dependent upon the carrying out of the other. In other words, the new corporation acquired substantially all of the assets of two existing corporations, pursuant to a definite and mutually agreed plan.

The Revenue Act of 1926 provides:

> "203 (h) (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corpora-

tion of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

The Circuit Court of Appeals held that the acquisition of substantially all of the properties of another corporation did not constitute a reorganization within the meaning of the above statute.

That is the question presented to this Court.

Statement of Facts.

As a result of negotiations which took place during the greater part of 1926, it was agreed that Petitioner and Citizens Company, two corporations, most of whose stock was owned by the same persons, would transfer all of their operating properties, being substantially all of their assets, to a new corporation to be formed, for a consideration, in Petitioner's case, of $400,000 in cash and $1,000,000 in promissory notes of the new corporation secured by bonds, in turn, secured by a mortgage on the properties, and in the case of the Citizens Company, a similar consideration. It was definitely agreed by the directors and stockholders of Petitioner and Citizens Company, prior to the consummation of the agreement, that the two corporations would cease business, be dissolved, and the assets forthwith distributed to the stockholders.

On November 4, 1926, separate contracts were made by Petitioner and Citizens Company, each with the National

Public Service Company, setting out the terms of the agreement with reference to the transfer of the assets. In the contracts the word "sale" was used. The performance of each of these contracts was dependent upon the performance of the other.

In December, 1926, pursuant to the agreements, National Public Service Corporation caused a new corporation to be formed, known as the Florida West Coast Ice Company, which corporation carried out the agreements and at the time of the conveyance of the properties, delivered cash and promissory notes, secured by mortgage bonds as agreed. A large part of the cash paid for Petitioner's property was paid either directly to creditors of Petitioner or through Petitioner, to creditors. The remaining proceeds of the transfer, after deduction for expenses, was distributed to the stockholders by trustees in liquidation of Petitioner and Citizens Company. (R. 22-30.)

The Commissioner of Internal Revenue determined that there was a taxable profit to Petitioner in the sum of $552,144.12 and a tax thereon in the sum of $74,673.50, which action has been sustained by the Circuit Court of Appeals for the Fifth Circuit. Petitioner contends that in accordance with the above statute the corporation is not subject to tax. There is a single tax to the stockholders and not a double tax, one to the corporation and one to the stockholders.

Errors Relied Upon.

(1) The Circuit Court of Appeals erred in failing to find that the acquisition of substantially all the assets

of petitioner by another corporation constituted a reorganization under Section 203 of the Revenue Act of 1926.

(2) The Circuit Court of Appeals erred in not finding that the acquisition of substantially all of the petitioner's assets by another corporation in exchange for cash and securities and the distribution of the proceeds thereof was a transaction upon which gain was not recognizable to Petitioner pursuant to Section 203 of the Revenue Act of 1926.

(3) The Circuit Court of Appeals erred in failing to find that the Board of Tax Appeals erred in including in Petitioner's taxable income for the year 1926 the amount of $552,144.12 as profit on the transfer of its assets to the Florida West Coast Ice Company.

Reasons for Granting the Writ.

The Circuit Court of Appeals has held that the acquisition of substantially all of the assets of one corporation by another corporation does not constitute a reorganization within the meaning of that part of the Revenue Act of 1926 above quoted.

In so construing the statute, the Court has adopted a construction which is

(1) plainly contrary to the explicit language of the statute,

(2) contrary to the construction by the Treasury Department of the same language in the Revenue Act of 1924 and the Revenue Act of 1926. Art. 1574, Regulations 65; Art. 1574, Regulations 69; G. C.

M. 3827, VII-2 C. B. p. 114; G. C. M. 7472, IX-1 C. B. p. 184; I. T. 2542, IX-2 C. B. p. 126; G. C. M. 8565, IX-2 C. B. p. 127.

(3) contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Williams* v. *Commissioner,* 44 Fed. (2) 467.

The question as to whether or not the acquisition of substantially all of the property of another corporation constitutes a reorganization within the meaning of the statute is of tremendous importance to the Government and to thousands of taxpayers. Since the enactment of the Revenue Act of 1924, there have been literally thousands of reorganizations of corporate structures. Questions as to whether or not taxable income or deductible loss resulted from these transactions are now before the Bureau of Internal Revenue in great volume, and it is respectfully urged that the question here presented to the Court is of utmost importance to a great number of citizens and taxpayers, as well as to The United States. The adjustment and settlement of great numbers of cases must await the final determination of this question.

Also, depending upon this question, is the question o basis for determining gain or loss, depreciation and depletion of assets, acquired by a corporation in such a transaction, in all subsequent years.

There are many cases now pending in the courts and before the Board of Tax Appeals in which this question is a necessary issue. We believe that the question will ultimately have to be decided by this court. The present interpretation by the Circuit Court of Appeals for the

Fifth Circuit is contrary to every interpretation of the section heretofore made by any administrative body or tribunal. It was assumed by both Petitioner and Respondent that the facts in this case constituted a reorganization, and neither side argued it in the original briefs. The question was referred to by the court in oral argument and there was some little discussion of it but it was assumed that the question was not serious. It is respectfully suggested that the court's decision on this question was without careful consideration.

The Board of Tax Appeals proceeded upon the theory of a reorganization but based its decision upon a distinction between a sale and an exchange. This distinction, however, cannot properly be made. Congress, itself, has completely disposed of such a distinction through its own interpretation. See Report of Ways and Means Committee on Revenue Act of 1924 (Report No. 179, 68th Congress), Report of Finance Committee of the Senate (Report No. 398, 68th Congress) and "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor", prepared by the Treasury Department and printed for use of Senate Finance Committee, dated March 6, 1924, pursuant to which both committees and Congress adopted the section proposed. The Bureau of Internal Revenue, in its regulations, likewise construed the statute. Article 1574, Regulations 65; Article 1574, Regulations 69. Congress reenacted the same language after these interpretations.

In other words, the purpose of the legislation, the language itself, the interpretation by Congress and the interpretation by the Bureau were to the effect that when

substantially all of the assets of a corporation were disposed of for cash and securities, and the proceeds were distributed to the stockholders, there should be only one tax, and that a tax upon the stockholders, based upon the profit realized by them.

It is respectfully urged that unless the Court grants this writ, there will be a great injustice to Petitioner. We believe that this Court will ultimately hold that such a transaction constitutes a reorganization within the meaning of the Revenue Act of 1926. The Bureau of Internal Revenue has imposed a *double* tax on the transaction. Congress said there should be but one tax. If, therefore, the Court should ultimately hold that our interpretation of the statute is correct, the Commissioner of Internal Revenue will have exacted over $74,000 and interest from Petitioner, illegally and without warrant of law.

Wherefore, it is respectfully submitted that this petition should be granted.

Albert L. Hopkins

Jay C. Halls

Peter L. Wentz

Attorneys for Petitioner.

Hopkins, Sutter, Halls & DeWolfe,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals is reported in 57 Fed. (2d) 188, and is found at page 42, in the record.

The findings of fact and opinion of the Board of Tax Appeals are reported in 21 B. T. A. 425 and are found at pages 22 and 30, respectively, in the record.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals was entered on March 29, 1932. (R. 34).

This Court has jurisdiction of this petition by virtue of Section 240 (a) of the Judicial Code, as amended. See also *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716.

Question Involved.

The question involved is whether the acquisition of substantially all the assets of one corporation or in this case of two corporations by another without stock control of the transferee by the transferor constitutes a reorganization within the meaning of Section 203 of the Revenue Act of 1926.

Statute Involved.

The Revenue Act of 1926 provides in part:

"Sec. 203 (b) (3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

"(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, * * *

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stock-

holders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization * * *."

(The Appendix contains Section 203 in its entirety.)

Statement.

A statement of the facts, errors relied on and reasons for granting the Petition for writ of certiorari will be found in the Petition.

ARGUMENT.

The Circuit Court of Appeals erroneously held that the acquisition of substantially all of the assets of one corporation by another is not a reorganization.

Whether gain or loss is recognized on a transaction may depend upon a number of questions, as well as on the question of whether the transaction was a reorganization. In this case the Circuit Court of Appeals made its decision solely on the ground that the transaction involved was not a reorganization. After stating its view regarding the existence of a reorganization, the court said:

> "It is unnecessary to pass upon petitioner's other contentions."

The Court of Appeals set forth its view of what constitutes a reorganization in the following language:

> "As applied to corporations the terms 'merger' and 'consolidation' have well known legal meanings. While the result is practically the same in either event, there is this difference. In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished. In either event the resulting corporation acquires all the property, rights and franchises of the dissolved corporations and their stockholders become its stockholders. *Royal Palm Soap Co.* v. *Seaboard Air Line Ry. Co.*, 296 Fed. 448; *Bouvier's Law Dictionary,* (3rd Ed.) p. 2202, *verbo* 'merger'.

> "It must be assumed that in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (b) of the paragraph removes any doubt as to the intention of Congress on this point."

We think it clear from the foregoing that the Court of Appeals decided the question without regard to the definition of the term "reorganization" in the statute, itself. The definition of "reorganization" by the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the legislative history of Section 203 of the Revenvue Act of 1926, the Treasury regulations, the rulings of the Commissioner of Internal Revenue, the decisions of the Board of Tax Appeals, and the case of *Williams* v. *Commissioner,* 44 Fed. (2d) 467, decided by the Circuit Court of Appeals for the Eighth Circuit.

The language of statutory definition of "reorganization" expressly includes a case of the simple acquisition of all the assets of one corporation by another without any acquisition of stock control by the transferor or its stockholders.

Section 203 (h) provides:

> "As used in this section and sections 201 and 204—
> (1), the term 'reorganization' means (a) a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation), * * *."

The wording of the statute permits no resort to extraneous definitions of reorganization as was done by the Circuit Court of Appeals in this case. Where a statute defines its terms, such definitions are controlling. "Reorganization" has been variously defined for different purposes. There have been a number of different statutory definitions. The term strongly needed definement in Section 203 and Congress did define it. That definition may not be disregarded.

The legislative history of Section 203 discloses that the definition applied by the Circuit Court of Appeals in this case nullifies the intent and defeats the purpose of Congress to eliminate double taxation in cases where a corporation disposes of substantially all its properties and distributes the proceeds to its stockholders. The statute is designed to avoid a tax on both the dissolving corporation, which serves merely as a conduit, and on its stockholders. Eliminating double taxation was further designed to remove what was otherwise a deterrent to normal business reorganization. The Circuit Court of Appeals in this case must have been oblivious of the meaning and purpose expressed in Section 203.

Prior to the Revenue Act of 1921, if a corporation transferred assets to another corporation and distributed the securities received to its stockholders, a taxable transaction resulted, both to the corporation and to the stockholders. It was recognized that this resulted in hardships upon taxpayers and hampered entirely proper and desirable business reorganizations. Consequently, the 1921 Act provided in Section 202 that in any corporate reorganization no gain or loss should result from the exchange of securities. The provisions of the 1921 Act, however, were still found to be too severe and, accordingly, section 203

of the Revenue Act of 1924 further liberalized the provisions of the 1921 Act. In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor", prepared by the Treasury Department for the use of the Committee on Finance of the United States Senate, it is said:

> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, *it is even more necessary to exempt from tax the gain realized by the corporation.*" (Italics supplied.)

And further:

> "A corporation in connection with a reorganization may dispose of its assets in one of three ways: It may transfer them to a new corporation in exchange for stock *or* cash; it may transfer them to the new corporation, the consideration being the payment by the new corporation of stock *or* cash to the stockholders of the old corporation; or the new corporation may buy, with its stock and cash, from the stockholders of the old corporation, their stock, and then liquidate the old corporation. If a corporation adopts the first method, its gain from the sale could be taxed. If it adopts the second method, the gain probably could be taxed on the theory of constructive receipt by the selling corporation. If it adopts the third method, there is no theory on which any gain to the old corporation could be taxed. *As a result of these considerations, subdivision (e) has been so drafted that the tax liability on the selling corporation is the same no mat-*

ter which of the three methods set out above is adopted. In other words, *if the selling corporation is a mere conduit* through which the consideration for the sale of the assets passes, or if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized, *and the same result is reached that would have to be reached necessarily if the transaction were accomplished through the medium of a purchase by the new corporation of the stock of the old corporation, followed by a liquidation of the old.*" (Italics supplied.)

The intention of Congress is further evidenced by the language contained in the Report of the Committee on Ways and Means in recommending the passage of the Bill. The Committee said, in referring to Section 203(e) of the 1924 Act:

> "The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash to its stockholders. But if the *selling* corporation fails to distribute the cash to its stockholders, then the gain or loss is to be recognized. *In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized,* but if it retains all or any of the proceeds with the result that the transaction is in substance a real sale, then all or a part of the gain shall be recognized." (Italics supplied.)

The Report of the Finance Committee of the Senate contained identical language to that contained in the Report of the Ways and Means Committee of the House of Representatives.

As hereinbefore stated, the provisions of the Revenue Act of 1926 and of the Act of 1928 in this connection are substantially identical with those of the Revenue Act of 1924.

From the foregoing, it clearly appears that Section 203(c) was intended to protect against double taxation of corporation and stockholder where, as part of the reorganization, the corporation disposes of its assets, distributes the proceeds and goes out of business. Under such circumstances, the stockholders are taxable but the corporation acts as a mere conduit and it was the intention of Congress that no tax be imposed upon the corporation. In this case the stockholders of the Pinellas Ice & Cold Storage Company, the petitioner, were subject to tax upon the proceeds distributed to them. Under the Statute there was no tax against the corporation upon the same proceeds.

Certainly the construction given the statute by the branches of the government charged with its enforcement is entitled to great weight. The Regulations of the Treasury Department recognize that under the statute the simple acquisition of substantially all the assets of one corporation by another is a "reorganization". This provision of the Revenue Act of 1924 is identical with that in the Revenue Act of 1926. Article 1574 of Regulations 65 under the Revenue Act of 1924 reads in part as follows:

> "If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2)

the sale of its properties by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all the properties of B, or (7) the transfer by A of all or part of its assets to B, where immediately after the transfer A or its shareholders are in control of B, * * *",

then no gain or loss to the corporation is recognized.

Further:

"Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.)

The first two examples of reorganizations under the statute set forth in the foregoing regulations have nothing whatever to do with stock control by the transferor or its stockholders. The acquisition of substantially all of the assets of a corporation alone constitutes a statutory reorganization. It makes no difference whatever whether the transaction comes within what the Circuit Court of Appeals referred to as "ordinary" definitions.

Article 1574 of Regulations 69 under the Revenue Act of 1926 reads in part as follows:

"If two or more corporations reorganize, for example, by—

"(1) the dissolution of corporation B and the sale of its assets to Corporation A,

"(2) the sale of its property by B to A,

"(3) the sale of the stock of B to A,

"(4) the merger of B into A,

"(5) the consolidation of A and B,

"(6) the acquistion by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all the properties of B, or

"(7) the transfer by A of all or part of its assets to B, where immediately after the transfer A or its shareholders are in control of B, * * *",

then no gain or loss to the corporation is recognized.

The Commissioner of Internal Revenue has repeatedly ruled that the simple acquisition of substantially all the property of one corporation by another is a reorganization under this provision of the statute. G. C. M. 3827, VII-2, C. B., Page 114, 1928. G. C. M. 7472, IX-1, C. B., Page 184, 1930. I. T. 2542, IX-2, C. B. 126, 1930. G. C. M. 8565, IX-2, C. B., Page 127, 1930.

There was corporate stock involved in some of these rulings, in one case, some preferred stock and no common, but in no case, is there any suggestion of control or of any particular percentage of stock. The General Counsel and the Bureau held in each case that there was a reorganization by reason of the acquisition of substantially all of the assets of a corporation.

In *G. C. M. 3827*, it was said (p. 115):

"It is noted that the O Company acquired all of the properties of the taxpayer company, and hence the transaction was a 'reorganization' within the express terms of the definition contained in section 203 (h) (1) * * *"

In *G. C. M. 7472*, it was said (p. 188):

> "It is clear that the transfer on ....., 1926, by the M Company of all its assets to the N Company, constituted 'the acquisition by one corporation of * * * substantially all the properties of another corporation' and hence a 'reorganization' within the meaning of section 203 (h)(1)(A) of the Revenue Act of 1926."

In *I. T. 2542*, it was said (p. 127):

> "In carrying out such plan, the M Company acquired the 10 Y shares of stock of the N Company, which constituted substantially all the assets of the old company. This transaction was a corporate reorganization within the meaning of section 112 (i) of the Act * * *" (Revenue Act of 1928).

In *G. C. M. 8565*, the General Counsel quoted from a discussion in the Senate in connection with the adoption of the Revenue Act of 1921, where, in discussing the following language:

> "A majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all of the properties of another corporation * * *"

Senator Simmons said:

> "That is in the disjunctive, 'or of substantially all of the properties'."

The decisions of the Board of Tax Appeals are practically to the same effect as the above opinions of the General Counsel. Wherever there has been an acquisition of substantially all of the assets of a corporation, the Board has held that there was a reorganization. In some of these

cases, stock was acquired and distributed to the stockholders but there is no requirement of controlling stock or of any percentage. In one case it was only preferred stock. *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242. In this case the Board said (p. 250):

> "Under the definition of a reorganization as contained in paragraph 203 (h)(1)(A), the acquisition of substantially all the property of one corporation by another is a reorganization * * *.
>
> "* * * Under the 1926 Act, the statute specifically states that a reorganization shall include the acquisition of substantially all the assets of another corporation. Definitions of a reorganization or what a reorganization might be in the absence of the definition in the statute do not have the effect of changing what the statute specifically provides shall be included in a reorganization."

This decision was acquiesced in by the Commissioner of Internal Revenue but later the acquiescence was revoked because of the "failure of the Board's decision to limit the word 'distribute' to the cash distributions made to the stockholders."

In *Green* v. *Commissioner*, 24 B. T. A. 719, the Board at page 725 quoted the following language from G. C. M. 1753 (C. B. VI-1, p. 138),

> "For example, a transfer of *all* of the assets of a corporation constitutes a reorganization under the second part of definition (A) irrespective of the element of eighty per cent control demanded by definition (B)."

See also *Tulsa Oxygen Co.* v. *Commissioner*, 18 B. T. A. 1283.

The Circuit Court of Appeals for the Fifth Circuit in the case at bar decided that there is no merger or consolidation or statutory reorganization unless the stockholders of the merged or consolidating corporations become the stockholders in the resulting corporation. The statute speaks of "stock or securities" in the disjunctive throughout. Stock is not necessary. *Williams* v. *Commissioner*, 44 Fed. (2d) 467, decided by the Circuit Court of Appeals for the Eighth Circuit on October 10, 1930 is squarely contrary to the decision below. That case was under the Revenue Act of 1926. It appeared that the new Alberni-Pacific Company purchased all the stock of the old Alberni-Pacific Company in consideration of bonds and cash of the new company. The properties of the old company were transferred to the new company. Neither the old corporation nor its stockholders received any stock in the new corporation. In spite of the fact that neither the old corporation nor its stockholders held any stock interest in the new corporation, the Circuit Court of Appeals for the Eighth Circuit held that there was a reorganization on which neither gain nor loss would be recognized under the Revenue Act of 1926. We respectfully submit that the construction of the statute made by the Circuit Court of Appeals for the Eighth Circuit is correct and that the construction adopted by the Circuit Court of Appeals for the Fifth Circuit in this case is erroneous and ought to be corrected.

As well as being a reorganization, the transaction in other respects was a non-taxable transaction.

There was an exchange of substantially all of Petitioner's assets for cash and securities, as provided in section 203 (c)(1) of the Revenue Act of 1926. Promissory notes, secured by mortgage bonds, are securities. *G. C. M. 2000*, C. B. VI-2, page 248 at 250, *First National Bank* v. *United States*, 283 U. S. 142, *G. C. M. 3291*, C. B. VII-1, page 203.

The proceeds of the transfer were distributed to the stockholders in pursuance of the plan of reorganization. The Board of Tax Appeals found as a fact that there was a plan to convey the properties, dissolve the corporations and distribute the proceeds to the stockholders, all of which was carried out. (R. 30). It is true that some of the cash was used to pay debts of Petitioner. Distribution could not have been made without paying such debts. As a matter of fact, most of that part of the proceeds used to pay Petitioner's debts was never actually received by Petitioner but was paid directly to the creditors by the transferee. The transaction was fundamentally the same as if Petitioner's assets had been transferred subject to its liabilities. In legal effect there was no difference.

The Board of Tax Appeals decided against Petitioner because it said the transaction in question was a *sale* as distinguished from an *exchange*, and that only exchanges, as it defined them, were free from the double taxation. The Board was clearly in error.

The express purpose of Congress in this legislation was to relieve from double taxation where there was a transfer of substantially all of the assets of a corporation, a dis-

solution of the corporation and a distribution of the assets to the stockholders. The manner in which the assets are transferred is wholly immaterial, both as a matter of common sense, the reason for the legislation being the same in either event, and in the interpretation by Congress and by the Bureau of Internal Revenue. The Committees of Congress, in considering the legislation, and the Treasury Department, in proposing the legislation, and the Treasury Department in construing and administering the Act, have made no distinction between sale and exchange. In fact, the words have been used practically interchangeably. In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor," hereinabove quoted at page 15, the expressions "selling corporation," "consideration for sale" and "purchase by the new corporation," are used to explain what are non-taxable transactions under Section 203 of the Revenue Act of 1924, which is identical with Section 203 of the Revenue Act of 1926. The report of the Committee on Ways and Means, hereinbefore quoted at page 16, in explaining what transactions are non-taxable, used the expressions, "selling corporation," and "proceeds of the sale." As stated, the report of the Committee on Finance of the Senate contained identical language to that in the report of the Ways and Means Committee.

Article 1574 of Regulations 65, under the Revenue Act of 1924, hereinabove quoted at page 17, and Article 1574 of Regulations 69, under the Revenue Act of 1926, hereinbefore quoted at page 18, in discussing section 203 of the two statutes, repeatedly uses the word "sale" in describing non-taxable transactions. Regulations 65 was approved October 6, 1924 and Regulations 69 on August 28, 1926.

The Board of Tax Appeals, in deciding cases under Section 202 (b) of the Revenue Act of 1918 and Section 202 (c) of the Revenue Act of 1921, in each of which the word "exchange" was used (not "sale"), held in a number of cases that the transfer of property for cash and notes constituted an exchange within the meaning of those two statutes. In *Appeal of Somers Lumber Company*, 2 B. T. A. 196, where cash and a second mortgage were received in exchange for the property, the transaction was held to be taxable under section 202 (b) of the Revenue Act of 1918, which provides that:

> "When property is exchanged for other property, the property received in exchange shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any, * * *"

In *Appeal of J. S. Cullinan*, 5 B. T. A. 996, the transferor received cash and vendors' lien notes and the Board held him taxable under section 202 (b) of the Revenue Act of 1918. In *Appeal of Anton M. Meyer*, 3 B. T. A. 1329, the transferor received cash and notes and it was held that he came within section 202 (c) of the Revenue Act of 1921, which provides for the exchange of property. In *Foster* v. *Commissioner*, 19 B. T. A. 958, cash and unsecured promissory notes were held to be an exchange under the Revenue Act of 1918. See also *Rusk* v. *Commissioner*, 20 B. T. A. 138, *Parris* v. *Commissioner*, 20 B. T. A. 320, *Appeal of Rodenbaugh*, 1 B. T. A. 477, affirmed in 25 Fed. (2d) 13. The Court of Appeals said in its opinion, page 15:

> "A statute must be read in the light of its purpose. *Tucker* v. *Alexander*, 275 U. S. 228. As it is

clear that the Congress intended completely to avoid the inequity of double taxation, we shall, in order to effectuate its intention, give the statute a construction as broad as the intention itself."

See also *National Pipe & Foundry Company* v. *Commissioner*, 19 B. T. A. 242, in which the Board of Tax Appeals held that a transaction in all respects similar to the one at bar was a non-taxable reorganization. As stated, this decision was acquiesced in by the Commissioner of Internal Revenue, which acquiescence was subsequently withdrawn because of certain language which has no bearing upon the present issue.

The interpretation of the Committees of Congress was necessarily prior to the enactment of the legislation. Regulations 65, under the Revenue Act of 1924, were promulgated prior to the enactment of the Revenue Act of 1926. Regulations 69 were promulgated prior to the enactment of the Revenue Act of 1928. Many of the rulings by the Bureau and decisions by the Board of Tax Appeals were prior to the re-enactment of the same provisions in subsequent statutes. The re-enactment of the legislation by Congress in the light of such interpretation should be held an adoption by Congress of that interpretation. *Komada* v. *United States*, 215 U. S. 392; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, *Commonwealth Commercial State Bank* v. *Lucas*, 41 Fed. (2d) 111, in which the leading cases are cited and discussed.

CONCLUSION.

It is respectfully submitted that the opinion of the United States Circuit Court of Appeals for the Fifth Circuit is grossly erroneous, and is in conflict with other rulings and decisions; that in all other respects not covered by the opinion by the Circuit Court of Appeals the transaction involved was non-taxable; and that the petition for writ of certiorari should be granted.

Respectfully submitted,

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Ill.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CONCLUSION

APPENDIX.

Section 203 of the Revenue Act of 1926:

RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(5) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(c) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(c) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall

be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(f) If an exchange would be within the provisions of paragraph (1), (2), (3), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(g) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of section 201 for the purpose of determining the taxability of subsequent distributions by the corporation.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

FILE COPY

SEP 2 1

CHARLES ELMO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Ill.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CHICAGO LAW PRINTING CO., 40 S. CLINTON ST. FRANKLIN 6321

TABLE OF CONTENTS.

PAGE

PETITIONER'S REPLY BRIEF 1-7

CITATIONS:

Bank of Commerce v. Hart, 37 Nebr. 197, 202; 55 N. W. 631 5

Boston Railroad Holding Co. v. Commonwealth, 215 Mass. 493, 496, 497; 102 N. E. 650 5

Cortland Specialty Company v. Burnett, C. C. A.-2, July 29, 1932 ..... 2, 3

First National Bank v. United States, 282 U. S. 142 4

Harriman National Bank v. Commissioner of Internal Revenue, 43 Fed. (2d) 950, 952 5

Jennings v. Davis, 31 Conn. 134, 139 4

J. S. Lang Engineering Company v. Commonwealth, 231 Mass. 367, 371; 120 N. E. 843 5

Mitchell v. Porter (Tex. Civ. A.) 194, S. W. 981, 985 5

National Pipe & Foundry Co. v. Commissioner, 19 B. T. A. 242 ..... 3, 5

Peaslee v. Rounds, 77 N. H. 544, 546; 94 Atl. 263 5

Rosenthal v. Brown, 247 N. Y. 479, 481; 160 N. E. 921 5

Wagner v. Scherer, 89 N. Y. App. Div. 202, 203; 85 N. Y. S. 894 4

Whiteley v. Arbogast, 17 Ohio Dec. 569, 574 5

Will of Stark, 149 Wis. 631, 657; 134 N. W. 389 5

Williams v. Commissioner, 44 Fed. (2d) 467 ..... 5, 7

G. C. M. 2000. C. B. VII-2, p. 248 at p. 250 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 182.

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

It is conceded by Respondent that the question of whether the transfer of substantially all of the property of one corporation to another corporation, of itself, constitutes a statutory reorganization is one of great importance in the administration of the law. It is also stated that the question "is one of sufficient general importance to merit review by this Court." Respondent suggests,

however, that there might be another ground upon which the present decision could be sustained and that the Court might be able to dispose of the case without deciding this admittedly important question.

We respectfully call the Court's attention to the fact that this case was decided by the Circuit Court of Appeals of the Fifth Circuit on the ground that the transfer of substantially all of the assets of one corporation to another was not a reorganization. Respondent cites *Cortland Specialty Company* v. *Burnett*, decided July 29, 1932 by the Circuit Court of Appeals for the Second Circuit, and copies the opinion in his brief. It will appear from the reading of that opinion that the underlying basis of the decision was that a transfer of substantially all of the assets of one corporation to another, of itself does not constitute a reorganization. The Court stated (p. 25, Respondent's Brief):

> "If the last clause means that if the transfer of 'substantially all of the properties' of one corporation to another corporation is a reorganization, the position of Cortland is strong, but we do not regard such an interpretation as warranted."

The Court said (p. 27):

> "Each transaction presupposes a continuance of interest on the part of the transferor in the properties transferred."

It is true that the Court went further and stated in the opinion that there must be stock or securities in addition to the cash, and that the promissory notes in that particular case were not securities. The real basis of the decision, as stated, was on the question which is admittedly of the greatest importance and which Respondent admits merits the consideration of this Court.

The *Cortland* case, decided since our petition was filed, has merely added to the confusion and has accentuated the conflict of decisions. As the situation now stands, the Fifth Circuit and the Second Circuit are in conflict with the Eighth Circuit, the Treasury Department, the Bureau of Internal Revenue and the Board of Tax Appeals. In *National Pipe & Foundry Co.* v. *Commissioner,* 19 B. T. A. 242, it was pointed out that the statute provides its own definition of reorganization, and that any outside general definition is of no importance.

We think it fair to say that there is no more important question before the Internal Revenue Bureau today than the question of what constitutes a reorganization, and that the present decision, as well as that in the *Cortland* case, contrary as they are to the rulings of the Bureau, are causing the utmost confusion. We venture to state that it would be a calamity to the Bureau of Internal Revenue if it should be held that the transfer of all of the assets of one corporation to another does not constitute a statutory reorganization. Gains which would have been subject to tax if the Court below is correct, were not taxed by the Bureau and in most instances, the statute of limitations has expired. During the last two and one-half years, which are still open for review by the Bureau of Internal Revenue, such transactions have largely resulted in losses which the taxpayer will be able to deduct but which heretofore the Bureau has not allowed as deductions.

The issue is therefore before us, and we can only repeat that both Respondent and Petitioner feel that the issue "merits review by this Court." It seems almost certain that the question must come to this Court in the near future and it is therefore obviously a great injustice to Petitioner if it should be denied relief.

We think Respondent is in error that this case may properly be decided on another ground. Respondent suggests that in order to come within the provisions of the statute, the consideration for the transfer of the properties must consist of "stock or securities" in addition to the cash; and then, strangely, takes the position that notes secured by first mortgage bonds are not securities. If one were defining securities, probably the first definition and the one most likely to be acquiesced in by everyone, would be notes secured by mortgages, or as in this case, notes secured by first mortgage bonds.

Respondent points out that there was a part payment in cash and that the balance of the consideration was to be paid in cash, and that the notes and bonds were merely to "evidence" the additional amounts due. It should have been added that the notes and bonds not only evidenced but *secured* the additional amount due. What are securities other than something given to secure the payment of money? Every bond, every note, every mortgage, every debenture, is given to evidence an agreement to pay and to secure the payment of money at some future time.

Notes are securities. *First National Bank* v. *United States,* 282 U. S. 142; *G. C. M. 2000.* C. B. VII-2, p. 248 at p. 250.

In *Jennings* v. *Davis,* 31 Conn. 134, 139, the court said:

> "Promissory notes among our people are regarded as 'securities' for money, more or less valuable, indeed, in proportion as the pecuniary ability and credit of the makers of them are more or less reliable."

In *Wagner* v. *Scherer,* 89 N. Y. App. Div. 202, 203; 85 N. Y. S. 894, the court said:

> "But the term 'securities' embraces promissory notes not only in a popular sense but in a legal sense as well."

In *Rosenthal* v. *Brown*, 247 N. Y. 479, 481; 160 N. E. 921, the court said:

> "The word 'securities' in its broadest sense, includes not only bonds and other promises to pay money, but also evidences of property such as corporate stocks."

In *J. S. Lang Engineering Company* v. *Commonwealth*, 231 Mass. 367, 371; 120 N. E. 843, the court said:

> "In its ordinary acceptation the word 'securities' includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness or of property, and not mere choses in action."

See, also, *Mitchell* v. *Porter* (Tex. Civ. A.), 194 S. W. 981, 985; *Will of Stark*, 149 Wis. 631, 657; 134 N. W. 389; *Whiteley* v. *Arbogast*, 17 Ohio Dec. 569, 574; *Peaslee* v. *Rounds*, 77 N. H. 544, 546; 94 Atl. 263; *Bank of Commerce* v. *Hart*, 37 Neb. 197, 202; 55 N. W. 631; *Boston Railroad Holding Co.* v. *Commonwealth*, 215 Mass. 493, 496, 497; 102 N. E. 650.

All the dictionaries, including the law dictionaries, commonly define "securities" as including evidences of debt, such as notes. The fact that notes are short term notes does not affect their character as securities was held in *Harriman National Bank* v. *Commissioner of Internal Revenue*, 43 Fed. (2d) 950, 952.

The length of time until the maturity of the security is of no importance. Is there any question that ninety day notes issued by the Treasury Department are securities? If the Bureau and the Treasury Department and the Court of Appeals for the Eighth Circuit, in *Williams* v. *Commissioner*, the Board of Tax Appeals in *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242, are correct that the mere transfer of substantially all of the assets of one corporation to another constitutes a statu-

tory reorganization, there is no requirement of continuity of control or interest in the transferee. In any case, where the consideration consists of notes, bonds or other securities, instead of stock, there is no continuity of control, and in fact, only a limited continuance of interest. If the notes or bonds are paid, the interest ceases, and it can make no possible difference whether the notes are paid in one year or in ten years. When they are paid gain is realized.

The attempted distinction between exchange and sale is wholly fictitious. There is no warrant in the statute for such a distinction. If there is a question at all, it is as to the nature of the consideration received for the transfer of the property. Whether or not a transfer solely for cash followed by immediate distribution is subject to a single tax or a double tax, is an undecided question. But where the consideration for the transfer is partly in cash and partly in securities, the transaction comes within the clear words of the statute.

The purpose of the legislation would be almost entirely defeated by the construction suggested by Respondent. The purpose of the legislation was to avoid oppressive double taxation on reorganizations and on liquidations of corporations where the proceeds of the liquidation were in pursuance of the liquidation distributed to the stockholders. The Treasury Department, in recommending the legislation, and Congress, in enacting the legislation, attempted to impose one tax only, and that upon the stockholders, which was obviously the only fair thing to do. As pointed out in the petition, the reports of the Treasury Department, the reports of the Committees, the Regulations of the Bureau and the Treasury Department, have all expressed this purpose and have so construed the statute.

It is respectfully urged that the Court should review this case and decide this question, which is of tremendous importance to the Bureau of Internal Revenue and to great numbers of citizens. The present case and the *Cortland* case now stand in conflict with *Williams* v. *Commissioner*, 44 Fed. (2d) 467, Circuit Court of Appeals for the Eighth Circuit, contrary to the regulations of the Treasury Department and to the rulings of the Bureau of Internal Revenue, and contrary to the decisions of the Board of Tax Appeals. We do not think that consideration of this question of reorganization can properly or should be avoided by a suggestion that notes secured by mortgage bonds are not securities. We do not think this point should be taken seriously, but if so, it then becomes of an importance equal to the other question in determining what is a statutory reorganization, the statute being the same in the Revenue Act of 1924, the Revenue Act of 1926, the Revenue Act of 1928 and the Revenue Act of 1932.

Respectfully submitted,

ALBERT L. HOPKINS,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Ill.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 17 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

ALBERT L. HOPKINS,
HARRY B. SUTTER,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Ill.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

CHICAGO LAW PRINTING CO., 40 S. CLARK ST. TEL. FRANKLIN 0761

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	5
Specification of Errors to be Urged	8
Summary of Argument	9
Argument:	
Introduction	11
I. The acquisition of substantially all of Petitioner's assets by another corporation was a reorganization under Section 203 of the Revenue Act of 1926	15
II. There was a reorganization plan and Petitioner was a party to the reorganization	29
III. There was an exchange of assets for securities and cash within the meaning of Section 203(e)(1) of the Revenue Act of 1926	30
IV. Notes secured by bonds in turn secured by mortgages on the properties of the maker of the notes are securities	35
V. The $400,000 cash used to pay Petitioner's debts may not be considered as taxable income	39
Conclusion	41
Appendix (Section 203 of the Revenue Act of 1926)	43

PAGE

AUTHORITIES CITED.

Cases:

Bank of Commerce v. Hart, 37 Neb. 197; 55 N. W. 631 38

Boston Railroad Holding Co. v. Commonwealth, 215 Mass. 493; 102 N. E. 650 38

Capital Traction Company v. Offutt, 17 App. D. C. 292 17

C. & E. I. R. R. Co. v. Doyle, 256 Ill. 514 18

Commonwealth Commercial State Bank v. Lucas, 41 Fed. (2nd) 111 28

Cortland Specialty Company v. Burnet, 60 Fed. (2nd) 937 ..... 27, 36

Cullinan v. Walker, 262 U. S. 134 11

Cullinan, Appeal of J. S., 5 B. T. A. 996 33

First National Bank of Champlain, N. Y. v. Comm'r., 21 B. T. A. 415 30

First National Bank of Chicago v. United States, 283 U. S. 142 37

Foster, Ed. v. Commissioner, 19 B. T. A. 958 34

Green v. Commissioner, 24 B. T. A. 719 25

Harriman National Bank v. Commissioner of Internal Revenue, 43 Fed. (2nd) 950 38

Komada v. United States, 215 U. S. 392 28

J. S. Lang Engineering Company v. Commonwealth, 231 Mass. 367, 120 N. E. 843 38

Meyer, Appeal of Anton M., 3 B. T. A. 1329 33

Mitchell v. Porter (Tex. Civ. A.), 194 S. W. 981 38

National Pipe & Foundry Company v. Comm'r., 19 B. T. A. 242 ..... 16, 25, 30, 39, 40

PAGE

Parris, William, v. Comm'r., 220 B. T. A. 320 34

Peaslee v. Rounds, 77 N. H. 544; 94 Atl. 263 38

Prairie Oil & Gas Company v. Motter, Collector, C. C. H. Par. 9498 26

Rockefeller v. United States, 257 U. S. 176 11

Rodenbough, Executor, Appeal of, 1 B. T. A. 477, 25 Fed. (2nd) 13 32

Rosenthal v. Brown, 247 N. Y. 479, 481; 160 N. E. 921.... 38

Rusk, Charles A., et al. v. Commissioner, 20 B. T. A. 138 34

Somers Lumber Company, Appeal of, 2 B. T. A. 106.... 33

Stark, Will of, 149 Wis. 631; 134 N. W. 389 38

Tulsa Oxygen Co. v. Comm'r., 18 B. T. A. 1283.....25, 30

United States v. Cerecedo Hermanos y Compania, 209 U. S. 337 28

United States v. Phellis, 257 U. S. 156 11

Wallis, Tractor Co., Appeal of, 3 B. T. A. 981 11

Warner Company v. Comm'r., 26 B. T. A. ....; C. C. H. Dec. 7776 27

Whitely v. Arbogast, 17 Ohio Dec. 569 38

Williams v. Comm'r., 44 Fed. (2nd) 467 25

Statutes and Regulations:

Sec. 240(a) Judicial Code 2

Sec. 203 of the Revenue Act of 1926 .....2, 3, 15, 18

Art. 1574, Regulations 65 (Rev. Act 1924) 22, 31

Art. 1575, Regulations 65 (Rev. Act 1924) 22

Art. 1574, Regulations 69 (Rev. Act 1926) 21, 22, 32

Art. 1575, Regulations 69 (Rev. Act 1926) 22

PAGE

Bureau of Internal Revenue Rulings and Miscellaneous:

G. C. M. 1753, V-1 C. B., p. 138 25

G. C. M. 2000, VI-2 C. B., p. 248 36

G. C. M. 3291, VII-1 C. B, p. 203 37

G. C. M. 3827, VII-2 C. B., p. 114 ..... 23, 29, 41

G. C. M. 7472, IX-1 C. B., p. 184 ..... 23, 30

G. C. M. 8565, IX-2 C. B., p. 127 24

I. T. 2542, IX-2 C. B., p. 126 ..... 24, 30

Fletcher on Corporations, Volume 7, page 8465 17

Report of the Finance Committee of the Senate on the Revenue Act of 1921 12

Report of the Ways and Means Committee on the Revenue Act of 1924 (Report No. 179, 68th Congress) 14

Report of the Finance Committee of the Senate on the Revenue Act of 1924 (Report No. 398, 68th Congress) 14

Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, dated March 6, 1924 ..... 12, 20, 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 182.

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

Opinions Below.

The findings of fact and opinion of the United States Board of Tax Appeals (R. 12-24) are reported in 21 B. T. A. 425.

The opinion of the United States Circuit Court of Appeals (R. 28-31) is reported in 57 Fed. (2d) 188.

PAGE

Bureau of Internal Revenue Rulings and Miscellaneous:

G. C. M. 1753, V-1 C. B., p. 138 25

G. C. M. 2000, VI-2 C. B., p. 248 36

G. C. M. 3291, VII-1 C. B, p. 203 37

G. C. M. 3827, VII-2 C. B., p. 114 ..... 23, 29, 41

G. C. M. 7472, IX-1 C. B., p. 184 ..... 23, 30

G. C. M. 8565, IX-2 C. B., p. 127 24

I. T. 2542, IX-2 C. B., p. 126 ..... 24, 30

Fletcher on Corporations, Volume 7, page 8465 17

Report of the Finance Committee of the Senate on the Revenue Act of 1921 12

Report of the Ways and Means Committee on the Revenue Act of 1924 (Report No. 179, 68th Congress) 14

Report of the Finance Committee of the Senate on the Revenue Act of 1924 (Report No. 398, 68th Congress) 14

Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, dated March 6, 1924 ..... 12, 20, 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 182.

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

Opinions Below.

The findings of fact and opinion of the United States Board of Tax Appeals (R. 12-24) are reported in 21 B. T. A. 425.

The opinion of the United States Circuit Court of Appeals (R. 28-31) is reported in 57 Fed. (2d) 188.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 29, 1932 (R. 31). The Petition for certiorari was filed June 27, 1932. Certiorari was granted October 10, 1932. (R. 32.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Section 203 of the Revenue Act of 1926 provides that no gain or loss shall be recognized, so far as the corporation is concerned, when a corporation, a party to a reorganization, exchanges property for securities and cash received from another corporation, a party to the reorganization, and the proceeds are distributed in pursuance of the plan of reorganization.

A newly formed corporation acquired over 99 per cent of the assets of Petitioner, and, likewise, substantially all the assets of another corporation known as Citizens Ice & Cold Storage Company (hereinafter called "Citizens Company"). The acquisition of these two properties was in pursuance of a plan, worked out over a period of months, and two agreements, the carrying out of each of which was dependent upon the carrying out of the other. In other words, the new corporation acquired substantially all of the assets of two existing corporations, pursuant to a definite and mutually agreed plan. (R. 17-19.)

The Revenue Act of 1926 provides:

> "203 * * * (h) * * *(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority

of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

The Circuit Court of Appeals held that the acquisition of substantially all of the properties of another corporation did not of itself constitute a reorganization within the meaning of the above statute.

This decision results in the imposition of two income taxes, one against the corporation and one against the stockholder. The question here presented is whether or not, under the Revenue Act of 1926, upon the transfer of all the assets of a corporation for cash and securities and the distribution of the proceeds, there is a double income tax, or whether there is only a single tax and that upon the stockholder, the ultimate beneficiary.

Statute Involved.

The Revenue Act of 1926 provides in part as follows:

"Sec. 203. * * * (b) * * * (3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

"(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange,

* * *

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization * * *."

(The Appendix contains Section 203 in its entirety.)

Statement.

This case is before this Court on writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit (R. 32). The Circuit Court of Appeals affirmed (R. 31) the decision of the United States Board of Tax Appeals determining an additional income tax upon Petitioner for the calendar year 1926 (R. 24) as a result of recognizing gain to the Petitioner on the transaction herein next described.

Petitioner and Citizens Ice and Cold Storage Company were Florida corporations owned by substantially the same stockholders. "The Fitkin interests (National Public Service Corporation) desired to acquire the business of both companies, but were unwilling to consider the acquisition of one without the other. All the directors and stockholders of both companies were anxious to dispose of all the properties of the two companies, and upon the disposal of the properties to discontinue business, dissolve the corporations, and distribute the proceeds. * * * It was definitely understood and agreed by all of the stockholders and directors that upon the making of the transfer of the properties, the affairs of the two corporations would be wound up, the assets distributed to the stockholders in liquidation, and the corporations dissolved." (Findings of Fact, R. 13-14.)

Negotiations to bring about the transfer were commenced in February, 1926 and culminated in agreements that Petitioner and Citizens Company would transfer their operating properties, being 99% of Petitioner's assets, (Findings of Fact, R. 19) and substantially all of the assets of Citizens Company, to a new corporation to be organized for the purpose known as Florida West Coast Ice Com-

pany for cash sufficient to pay liabilities and for notes secured by first mortgage bonds. (Findings of Fact, R. 13-14.) "In October, 1926, the directors of petitioner and the Citizens Company met and unanimously approved the terms of the agreement with the National Corporation and at that time confirmed their prior agreements and understandings that the proceeds of the transfer would be distributed and the corporations dissolved." (Findings of Fact, R. 14.)

Pursuant to the plan, on November 4, 1926, separate contracts were made by Petitioner and Citizens Company with the National Public Service Corporation setting out the terms of the agreement with reference to the transfer of the assets. The performance of each of the contracts was dependent upon the performance of the other. Under Petitioner's contract it was to receive for its properties $400,000 in cash, which was the amount determined as necessary to discharge Petitioner's liabilities (Findings of Fact, R. 16) and $1,000,000 in 6% notes secured by bonds in turn secured by a mortgage on the properties transferred by Petitioner and Citizens Company. The properties were to be transferred free of all defects, liens and encumbrances. (Findings of Fact, R. 14-16.)

In December, 1926, National Public Service Corporation caused a new corporation to be formed known as the Florida West Coast Ice Company, for the purpose of carrying out the agreements with Petitioner and the Citizens Company. Thereafter, on December 17, 1926, representatives of Petitioner, Citizens Company, Florida West Coast Ice Company and creditors of Petitioner and Citizens Company met for the purpose of consummating the transaction. The properties of Petitioner and Citizens Company were transferred to Florida West Coast Ice Company. Approximately $226,000 was paid by the trans-

feree directly to creditors of Petitioner. $137,000 was paid to Petitioner, who, in turn, paid the balance of its liabilities. $33,000 had already been advanced to Petitioner for the express purpose of retiring its outstanding bonds. The balance of the consideration for the transfer, $1,000,000 face value of 6% notes secured by mortgage bonds, were delivered to Petitioner, which notes represented Petitioner's equity in the property transferred after payment of debts. The transfer of the property of Citizens Company was consummated at the same time in the same manner. (Findings of Fact, R. 17-19.)

On January 20, 1927, pursuant to the plan theretofore made, formal resolutions were passed for the winding up of the affairs of both Petitioner and Citizens Company, distribution of the assets and dissolution of the two corporations. The outstanding certificates of stock of Petitioner were surrendered to the company and remained in its custody. Distribution of all of the assets was promptly made except that a small amount of cash was retained as a contingent fund for possible expenses. (Findings of Fact, R. 18-19.)

Petitioner, in its income tax return for 1926, included no profit on this transfer, relying upon the fact that it was a party to a non-taxable reorganization within the meaning of Section 203. The Commissioner of Internal Revenue held that Petitioner was subject to tax. The Board of Tax Appeals approved the Commissioner's action on the ground that the transaction did not constitute an *exchange* within the meaning of Section 203 of the Revenue Act of 1926.

The Circuit Court of Appeals affirmed the Board of Tax Appeals on the ground that the acquisition of substantially all of the assets of one corporation by another

without stock control of the transferee by the transferor or its stockholders is not a reorganization within the meaning of the above statute (R. 28-31). Respondent admitted in its brief in opposition to the petition for certiorari, page 10, that this interpretation by the Circuit Court of Appeals is contrary to the construction of the statutory definition of "reorganization" by the Treasury Department.

Respondent's position has been that the transfer of the assets from Petitioner and Citizens Company to Florida West Coast Company was a sale as dinstinguished from an exchange largely because of the use of the words "sale," "vendor," and "purchaser" in the contracts, and that Section 203 (c) (1) did not apply to sales. Petitioner's position is that no such distinction is made in the statute, the only test being whether substantially all the properties of one corporation are transferred to another corporation for stock or securities.

Respondent contended below that at least the $400,000 cash payment which was used to pay creditors was subject to tax. Petitioner contends that this payment used to liquidate indebtedness was not taxable profit, was in fact distributed and further that the substance of the transaction was a transfer subject to liabilities and that Petitioner received only notes secured by mortgage bonds for its net assets.

Specification of Error to Be Urged.

(1) The Circuit Court of Appeals erred in failing to hold that the acquisition of substantially all of the properties of Petitioner by another corporation constituted a reorganization under Section 203 of the Revenue Act of 1926.

(2) The Circuit Court of Appeals erred in not holding that the acquisition of substantially all of the Petitioner's properties by another corporation in exchange for cash and securities and the distribution of the proceeds thereof was a transaction upon which gain was not recognizable to Petitioner pursuant to Section 203 of the Revenue Act of 1926.

(3) The Circuit Court of Appeals erred in failing to hold that the Board of Tax Appeals erred in including in Petitioner's taxable income for the year 1926 the amount of $552,144.12 as profit on the transfer of its properties to the Florida West Coast Ice Company.

Summary of Argument.

There was a reorganization within the meaning of the statute because substantially all, 99%, of Petitioner's properties were acquired by another corporation. The statute itself, for the purposes of the statute, defines reorganization as including "the acquisition by one corporation of * * * substantially all the properties of another corporation". The administrative construction of the statute has always given the language of the statute its literal meaning regardless of stock control or the receipt of any stock by the transferor or its stockholders. That accords with the legislative history and purpose of Section 203 of the Revenue Act.

There was a plan of reorganization and Petitioner was a party to the reorganization. The findings of fact state that everything was done pursuant to a plan. Petitioner was necessarily a party to the reorganization.

There was an exchange for securities and cash within the meaning of the statute. The word "exchange" in-

cludes sale. Congress did not use the term "barter." The legislative history shows that Congress and the Treasury Department used the terms "exchange" and "sale" interchangeably. The regulations of the Treasury Department interpreting the statute likewise use the terms interchangeably. Whether there was an exchange or not within the meaning of the statute depends upon the nature of what was received in return for Petitioner's property. The receipt of either securities or stock alone or with cash constitutes an exchange. Petitioner received securities in the form of notes secured by mortgage bonds.

To the extent that the transferor corporation retains the cash there may be a taxable profit. In this case Petitioner retained no cash but the cash was used for the payment of its debts. Liabilities must be paid before liquidation and distribution to stockholders. Whether the property is sold subject to debts or part of the proceeds used to pay the debts, the result is the same. In this case a substantial part of the debts, approximately $226,000, was paid directly by the transferee, the balance approximately $174,000 by Petitioner.

The purpose of Congress in enacting Section 203 was to relieve from double taxation where a corporation conveys substantially all of its assets, winds up its affairs, liquidates and dissolves. The statute imposes one tax, and that upon the stockholders.

ARGUMENT.

Introduction.

No question arises in this case as to the taxability of the profit derived by the stockholders of Petitioner upon the receipt by them of the proceeds received from the transferee. The Revenue Act of 1926 does not impose a tax upon the corporation in a transaction of this kind. It was the intention of Congress to avoid double tax,—one upon the corporation and one upon the stockholder, where the corporation disposes of substantially all of its properties for cash and securities and merely serves as a conduit for the distribution of such proceeds to its stockholders.

The legislative history and purpose of the statute should be kept in mind. The reorganization provisions of the 1924 and 1926 Acts which are retained in the 1928 and 1932 Acts were remedial and intended to eliminate double taxation. Prior to the Revenue Act of 1921, if a corporation transferred its assets to another corporation and distributed the proceeds received to its stockholders, a double tax resulted, one on the corporation and one on the stockholders. *Rockefeller* v. *United States*, 257 U. S. 176; *United States* v. *Phellis*, 257 U. S. 156; *Cullinan* v. *Walker*, 262 U. S. 134; *Appeal of Wallis Tractor Co.*, 3 B. T. A. 981.

If the same result were accomplished by the sale of all of the stock to another corporation and the assets thereafter liquidated to the purchasing corporation, there would be but one tax, and that on the stockholder. It was rec-

ognized that the double tax, where the corporation first disposed of its assets and distributed the proceeds, was not only a hardship and hampered business reorganization but was also a discrimination in favor of those who accomplished the same result in another manner.

The 1921 Act provided in Section 202 that in any corporate reorganization, no gain or loss should result from the exchange of securities. The Report of the Committee on Finance of the United States Senate, in referring to the changes made by the Revenue Act of 1921, in connection with the tax upon exchanges of property, said:

> "Probably no part of the present income tax law has been productive of so much uncertainty or has more seriously interfered with necessary business readjustment. * * *
>
> "The preceding amendments, if adopted, will, by removing a source of grave uncertainty and by eliminating many technical constructions which are economically unsound, not only permit business to go forward with the readjustments required by existing conditions, but also will considerably increase the revenue by preventing the taxpayers from taking colorable losses in wash sales and other fictitious exchanges."

The provisions of the 1921 Act, however, were still found to be inadequate to accomplish the full result desired, and in Section 203 of the Revenue Act of 1924 the provisions of the 1921 Act were still further liberalized. In the "Statement of the Changes Made in the Revenue Act of 1921 by H. R. 6715 (Revenue Act of 1924) and the Reasons Therefor," prepared by the Treasury Department for the

use of the Committee on Finance of the United States Senate, it is said:

"A corporation in connection with a reorganization may dispose of its assets in one of three ways: It may transfer them to a new corporation in exchange for stock *or* cash; it may transfer them to the new corporation, the consideration being the payment by the new corporation of stock *or* cash to the stockholders of the old corporation; or the new corporation may buy, with its stock and cash, from the stockholders of the old corporation, their stock, and then liquidate the old corporation. If a corporation adopts the first method, its gain from the sale could be taxed. If it adopts the second method, the gain probably could be taxed on the theory of constructive receipt by the selling corporation. If it adopts the third method, there is no theory on which any gain to the old corporation could be taxed. *As a result of these considerations, subdivision (c) has been so drafted that the tax liability on the selling corporation is the same no matter which of the three methods set out above is adopted.* In others words, *if the selling corporation is a mere conduit* through which the consideration for the sale of the assets passes, or if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized, *and the same result is reached that would have to be reached necessarily if the transaction were accomplished through the medium of a purchase by the new corporation of the stock of the old corporation, followed by a liquidation of the old.*" (Italics supplied.)

The Committee on Ways and Means, in recommending the passage of the Bill, said, in referring to Section 203 (e) of the 1924 Act:

> **"In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized, * * *." (Report No. 179, 68th Congress.)**

The Report of the Finance Committee of the Senate (Report No. 398, 68th Congress) contained identical language to that contained in the Report of the Ways and Means Committee of the House of Representatives.

The provisions of the Revenue Act of 1926 in this connection are substantially identical with those of the Revenue Act of 1924.

The transaction in the case at bar is exactly such a one as the Treasury Department, the Ways and Means Committee of the House and the Finance Committee of the Senate state that they intended to relieve from double taxation.

* * *

The facts in this case show that the transaction was a reorganization within the meaning of Section 203 of the Revenue Act of 1926, resulting in no tax to Petitioner:

(1) The transfer of substantially all of Petitioner's assets to another corporation constitutes a reorganization within the meaning of the statute.

(2) There was a plan of reorganization pursuant to which all steps in the transaction were taken, and Petitioner was a party to the reorganization.

(3) There was an exchange of assets for securities and cash within the meaning of Section 203 (e) (1) of the Revenue Act of 1926.

(4) The notes received by Petitioner, secured by bonds which in turn were secured by a mortgage on the properties of the transferee, were securities within the meaning of Section 203 of the Revenue Act of 1926.

(5) The fact that $400,000 of the proceeds was used in the payment of the debts of Petitioner does not make that amount taxable income to Petitioner.

These points will be discussed in the above order.

I.

The acquisition of substantially all of petitioner's assets by another corporation was a reorganization under Section 203 of the Revenue Act of 1926.

Section 203 (h) (1) provides:

> "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

A new corporation, Florida West Coast Ice Company, was organized and acquired all of the operating assets of

two corporations, Petitioner and Citizens Company. The property so acquired from Petitioner was 99% of its total property. Substantially all of the property of Citizens Company was likewise acquired by the Florida West Coast Company. The balance of the property of Petitioner and the Citizens Company was conveyed to a fourth corporation as trustee for the stockholders. Dissolution proceedings for both Petitioner and the Citizens Company were instituted, their debts paid, their affairs wound up, and the two corporations were dissolved. (R. 18-19.)

There was a reorganization, therefore, within the express definition of the statute. The Circuit Court of Appeals held that there was no reorganization because it stated the term "reorganization" as ordinarily defined requires a continuance of stock control of the transferee by the transferor or its stockholders.

The wording of the statute permits no such construction. Where a statute defines its terms, such definitions control and resort to definitions outside the statute are unnecessary. There have been many definitions of "reorganization," both statutory and otherwise. As stated in *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242, 250, "Under the 1926 Act the statute specifically states that a reorganization shall include the acquisition of substantially all the assets of another corporation. Definitions of a reorganization or what a reorganization might be in the absence of the definition in the statute do not have the effect of changing what the statute specifically provides shall be included in a reorganization."

The statutory definition of "reorganization" is purposely very broad. It includes recapitalization, mere change in identity, form or place of organization, acquisition of all the property of one corporation by another

corporation, acquisition by one corporatoin of a majority of the stock of another corporation, a merger or consolidation "however effected". In this case we have, pursuant to a plan, not only the acquisition by one corporation of substantially all of the property of another corporation, but we have, in addition, the acquisition by one corporation of substantially all the property of two corporations and the dissolution of the transferor corporations. These facts constitute a reorganization. The words "reorganization", "consolidation" and "merger" have no definite crystalized meanings. They must be defined in connection with the particular statute or document in which they are used. The context and the purpose sought to be accomplished determine the meaning of the words in each particular case. Courts have variously defined the terms,—some broad and some narrow—but such definitions are valueless in the absence of the particular statute or document under consideration.

> "The term (Reorganization) * * * has no very definite meaning in the law of corporations, but is applied indifferently to various proceedings and transactions by which succession of corporations is brought about, and also to proceedings by which existing corporations are continued under a different organization without the creation of a new corporation." *Fletcher Cyclopedia Corporations*, Volume 7, page 8465.
>
> "There is no magic in the use of the word 'consolidation' to effect that result. If the coming together of two corporations under the authority of law be in fact consolidation, it is of no consequence by what name the act is characterized; nor is it of any consequence by what steps the result has been effected. One of those steps may take the shape of bargain and sale." *Capital Traction Company* v. *Offutt*, 17 App. D. C. 292.

> "Much is said in the argument about the terms 'merger' and 'consolidation,' and distinctions are sought to be drawn between the two forms of contract. We do not attach great importance to this line of argument. While there appears to be a distinction recognized by most of the authorities between a 'merger,' strictly speaking, and a 'consolidation,' still the terms are not always used with strict accuracy. Besides, the agreement under consideration employs both terms, so that the true intent of the agreement cannot be determined by recourse to the dictionaries." *C. & E. I. R. R. Co.* v. *Doyle,* 256 Ill. 514, 522.

Congress in this section has used the word "reorganization" in a broad, generic and all-inclusive sense to accomplish a definitely expressed purpose. The restricted, narrow construction of this term adopted by the Circuit Court of Appeals defeats the purpose of Section 203.

The effect of the decision of the Circuit Court of Appeals is to exclude from the operation of Section 203 all cases where the transferor or its stockholders do not become stockholders of one transferee. But Section 203 applies to transfers either for stock *or* securities.

> "203 * * *(b) * * *(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock *or* securities in another corporation a party to the reorganization." (Italics supplied.)
>
> "203 * * * (e) If an exchange would be within the provisions of Paragraph (3) of Subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock *or* securities permitted by such paragraph to be received without the

recognition of gain, but also of other property or money, then—

"(1) if the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, * * * ." (Italics supplied.)

A reference to the definition of a reorganization in the statute, Section 203 (h) (1), will show that the requirement of control or stock ownership in the transferor applies only to subdivision (B), which provides that where one corporation acquires only part of the assets of another corporation, there must be an ownership of 80% of the stock by the transferor, or its stockholders. There is no stock requirement whatever where one corporation acquires substantially all the properties of another corporation as set out in subdivision (A). There is absolutely nothing requiring any element of control by the transferor or its stockholders, and, as stated, such a contention is completely negatived by the previous provisions of Section 203 which provide that *either* stock *or* securities may be received without subjecting the transferor to a tax.

Stock ownership is not essential. Securities are sufficient. The definition of "reorganization" applied by the Circuit Court of Appeals in this case defeats the purpose of Congress to eliminate double taxation in cases where a corporation disposes of substantially all of its properties and distributes the proceeds to its stockholders. The statute is designed to avoid a tax on both the dissolving corporation, which serves merely as a conduit, and on its stockholders. Further, the legislation was designed to remove what was otherwise a determent to normal business reorganization and eliminate the previous discrimination between the case where substantially all the assets of one

corporation are acquired by another and the proceeds distributed to the stockholders, and the case where the stock of one corporation is purchased by another and the assets of the old corporation then obtained by liquidation.

In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 (Revenue Act of 1924) and the Reasons Therefor", prepared by the Treasury Department for the use of the Committee on Finance of the United States Senate hereinabove quoted from on page 13, it is stated that a corporation in connection with a reorganization could dispose of its assets in one of three ways: (1) It could transfer the assets to a new corporation in exchange for stock or cash; (2) it could transfer the assets in consideration of stock or cash being paid to the stockholders of the old corporation; or (3) the new corporation could buy the stockholders' stock for stock and cash and then liquidate the old corporation. The statement then goes on to point out that under the first method the gain to the corporation would be taxed and that under the second method the gain probably could be taxed on the theory of constructive receipt by the selling corporation, but that under the third method there could be no tax to the old corporation. The statement then goes on to say that Subdivision (e) of the Revenue Act of 1924, then before Congress for consideration, had been so drafted that the tax liability on the selling corporation would be the same no matter which of the three methods set out above was adopted and states:

> " * * * *if the selling corporation is a mere conduit* through which the consideration for the sale of the assets passes, or if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized * * *."

As above stated at page 14, the reports of the Finance Committee of the Senate and the Ways and Means Committee of the House used almost identical language.

From the foregoing, it clearly appears that Section 203 (e) was intended to protect against double taxation of corporation and stockholders where, as part of the reorganization, the corporation disposes of its assets, distributes the proceeds and goes out of business. Under such circumstances, the stockholders are taxable but the corporation acts as a mere conduit and it was the intention of Congress that no tax be imposed upon the corporation.

The Regulations of the Treasury Department recognize that under the statute, the simple acquisition of substantially all of the assets of one corporation by another is a "reorganization" and that it is not necessary that the transferor corporation receive for its properties stock control of the transferee or, for that matter, any stock of the transferee. Article 1574 of Regulations 69 under the Revenue Act of 1926 provides, in part, as follows:

> "If two or more corporations reorganize, for example, by—
>
> "(1) the dissolution of corporation B and the sale of its assets to Corporation A,
>
> "(2) the sale of its property by B to A,
>
> "(3) the sale of the stock of B to A,
>
> "(4) the merger of B into A,
>
> "(5) the consolidation of A and B,
>
> "(6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or

"(7) the transfer by A of all or part of its assets to B where immediately after the transfer A or its shareholders are in control of B,

then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; * * * ."

Article 1575 provides as follows:

"If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized."

Article 1574 further states:

"Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575)"

Articles 1574 and 1575 of Regulations 65 under the Revenue Act of 1924 are practically identical.

It will thus be seen that the regulations of the Treasury Department are in accordance with the expressed purpose of Congress in enacting the legislation and in accordance with what seems to us the clear language of the definition of reorganization in Section 203 (h) (1). If, as pointed out in Example 7 in the Regulations, only a part of the

assets are transferred, the transferor or its stockholders must maintain a stock control. If, on the other hand, substantially all of the assets are sold, as pointed out in Example 2, there is no requirement for any stock ownership in the transferee. Likewise, there is no requirement of stock ownership in Example 1. It makes no difference whatever whether the transaction comes within what the Circuit Court of Appeals referred to as "ordinary" definitions.

The Commissioner of Internal Revenue has repeatedly ruled that the simple acquisition of substantially all of the property of one corporation by another is a reorganization under this provision of the statute. There was corporate stock involved in some of these rulings, in one case, some preferred stock and no common, but in no case is there any suggestion of control or of any particular percentage of stock. The General Counsel of the Bureau held in each case that there was a reorganization by reason of the acquisition of substantially all of the assets of a corporation.

In *G. C. M. 3827*, VII-2, C. B., 114, 1928, it was said (p. 115):

> "It is noted that the O Company acquired all of the properties of the taxpayer company, and hence the transaction was a 'reorganziation' within the express terms of the definition contained in section 203 (h) (1) * * *." (Revenue Act of 1926.)

In *G. C. M. 7472*, IX-1, C. B., 184, 1930, it was said (p. 188):

> "It is clear that the transfer on ....., 1926, by the M Company of all of its assets to the N Company, constituted 'the acquisition by one corporation of * * * substantially all the properties of another

corporation', and hence a 'reorganization' within the meaning of section 203 (h) (1) (A) of the Revenue Act of 1926."

In *I. T. 2542*, IX-2, C. B. 126, 1930, it was said (p. 127):

"In carrying out such plan, the M Company acquired the 10 Y shares of stock of the N Company, which constituted substantially all the assets of the O Company. This transaction was a corporate reorganization within the meaning of section 112 (i) of the Act * * * ." (Revenue Act of 1928).

In *G. C. M. 8565*, IX-2, C. B., 127, 1930, the General Counsel quoted from a discussion in the Senate in connection with the adoption of the Revenue Act of 1921, where, in discussing the following language:

"A majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all of the properties of another corporation * * * "

Senator Simmons said:

"That is in the disjunctive, 'or of substantially all of the properties', * * * ."

In Respondent's brief in opposition to the Petition for Certiorari, it is stated at page 10:

"We are informed that the consistent administrative construction of Section 203 (h) (1) (A) by the Treasury Department has always been that the acquisition of substantially all the property of a corporation is a 'reorganization' within the meaning of the statute, provided the other conditions of the statute are met. We are also informed by the Treasury Department that in thus construing the statute it has attempted to give proper effect to the parenthetical

clause in Section 203 (h) (1) (A) and, therefore, has not been and is not restricting the meaning of Section 203 (h) (1) (A) in accordance with the conclusion of the court below, in so far as it may be regarded as giving no effect to the parenthetical clause."

In *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242 the Board of Tax Appeals said (p. 250):

"Under the definition of a reorganization as contained in paragraph 203 (h) (1) (A), the acquisition of substantially all the property of one corporation by another is a reorganization. * * *."

In *Green* v. *Commissioner*, 24 B. T. A. 719, the Board, at page 725, quoted the following language from G. C. M. 1753 (C. B. VI-1, p. 138),

"For example, a transfer of all the assets of a corporation constitutes a reorganization under the second part of definition (A) irrespective of the element of eighty per cent control demanded by definition (B)."

See also *Tulsa Oxygen Co.* v. *Commissioner*, 18 B. T. A. 1283.

Williams v. *Commissioner*, 44 Fed. (2d) 467, decided by the Circuit Court of Appeals for the Eighth Circuit on October 10, 1930, is squarely contrary to the decision below. That case also arose under the Revenue Act of 1926. It appeared that the new Alberni-Pacific Company purchased all the stock of the old Alberni-Pacific Company in consideration of bonds and cash of the new company. The properties of the old company were transferred to the new company. Neither the old corporation nor its stockholders received any stock in the new corporation. The

Circuit Court of Appeals for the Eighth Circuit held that there was a reorganization on which neither gain nor loss would be recognized under the Revenue Act of 1926.

In *Prairie Oil & Gas Company* v. *Motter, Collector*, decided September 17, 1932 by the United States District Court for the District of Kansas, Second Division, not yet reported but published in Commerce Clearing House Income Tax Service for 1932 at paragraph 9498, it was held over the objection of the taxpayer that there was a reorganization under Section 203 (h) (1) of the Revenue Act of 1926 where a corporation purchased the stock of another corporation and obtained its assets through the dissolution of such other corporation, though the only consideration given by the acquiring corporation was cash. Neither the transferor nor its stockholders received any stock of the acquiring corporation. The court stated:

> "The whole question appears to turn on whether or not the parenthetical clause in Section 203 (h) (1) (A) is a clause of limitation or a clause of enlargement. It is strongly argued by plaintiff that the transaction would not fall within the term 'merger' or 'consolidation' as used in the ordinary sense because there was no exchange of stock, and that neither the term 'reorganization' or its explanatory terms 'merger' or 'consolidation' are broadened or added to by the addition of the parenthetical clause. Where the legislature expresses the meaning of a word or term within a tax statute, that meaning must be given to such a word or term by the courts. Congress may so define words as to extend their ordinary meaning. I am of opinion the meaning which Congress intended to give this parenthetical clause must largely turn upon the construction of the word 'including' which preceded it. 'Including' is a word of enlargement rather than a

word of limitation. Oxford's English Dictionary describes 'including' as a present participle which often governs the subject, and used in the same sense as 'inclusive of.'

"In *In re Goetz's Will*, 75 N. Y. Supp. 750-751, it is stated that ' "including" is not a word of limitation rather it is a word of enlargement and in ordinary signification implies that something else has been given beyond the general language which precedes it.'

"The only reasonable construction therefore which can be given Section 203 (h) (1), is that the term 'reorganization' means a merger or consolidation, which in addition to their ordinary meaning includes situations where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation or substantially all of the properties of another corporation. Under the facts in this case the plaintiff did acquire all of the stock of the Olean Petroleum Company and did acquire substantially all of the properties of the Olean Petroleum Company. It did, in fact, acquire all of the physical properties of the Olean Petroleum Company."

In *Cortland Specialty Company* v. *Burnet*, 60 F. (2d) 937, the Circuit Court of Appeals for the Second Circuit appears to have followed the Circuit Court of Appeals for the Fifth Circuit in the case at bar in holding that there must be a continuance of interest in order to constitute a reorganization. The Board of Tax Appeals, in a recent opinion, *Warner Company* v. *Commissioner*, 26 B. T. A. ....., promulgated October 19, 1932, Commerce Clear-

ing House Dec. No. 7776, cites and follows the opinion in the *Pinellas* case below and the *Cortland* case on this point. We think we have demonstrated that these decisions are clearly erroneous in requiring a continuity of interest. Ownership of stock is not a requisite to a reorganization within the meaning of the statute.

The interpretation by the Committees of Congress was necessarily prior to the enactment of the legislation. Regulations 65, under the Revenue Act of 1924, were promulgated prior to the enactment of the Revenue Act of 1926. Regulations 69 were promulgated prior to the enactment of the Revenue Act of 1928. Many of the rulings by the Bureau and decisions by the Board of Tax Appeals were prior to the re-enactment of the same provisions in subsequent statutes. The re-enactment of the legislation by Congress in the light of such interpretation should be held an adoption by Congress of that interpretation. *Komada* v. *United States,* 215 U. S. 392; *United States* v. *Cerecedo Hermanos* v. *Compania,* 209 U. S. 337, *Commonwealth Commercial State Bank* v. *Lucas,* 41 Fed. (2d) 111, in which the leading cases are cited and discussed.

If, in order to constitute a reorganization, Petitioner must have maintained a stock control or interest in the new company, then those parts of subdivisions (b) and (e) of section 203 which provide that the receipt of "securities" is sufficient to constitute a non-taxable transfer are wholly ineffective and the efforts of Congress and the Treasury Department to relieve from double taxation in such a case have been futile.

II.

There was a reorganization plan and petitioner was a party to the reorganization.

The Board of Tax Appeals found as a fact that there was a plan to dispose of the properties, dissolve the corporations and distribute the proceeds to the stockholders, all of which was carried out. (R. 19). Since there was a reorganization and since the details of the reorganization were worked out and agreed upon prior to the transfer of the assets of the Petitioner it necessarily follows that there was a "plan of reorganization". Petitioner was a party to the reorganization because Petitioner was a necessary participant in what took place. The decisions in the Board of Tax Appeals and the Bureau of Internal Revenue are uniformly to this effect.

In G. C. M. 3827, VII-2 C. B., 1928, page 114, the General Counsel of the Bureau of Internal Revenue discusses a situation where the properties of the M Company were transferred to the O Company in exchange for cash and shares of that company's preferred stock. The outstanding preferred stock of the M Company was then retired, the cash received from the O Company being used for this purpose. The expenses of dissolution were met out of the proceeds of the sale of shares of the O Company preferred stock. The M Company then distributed to its common stockholders the remaining shares of the O Company preferred stock acquired in the reorganization and formally dissolved. The M Company's status in the plan was identical with that of petitioner. The General Counsel stated:

> "It is the opinion of this office that the taxpayer company (the M Company) was a party to such reorganization." (Matter in parentheses added.)

See also, *First National Bank of Champlain* v. *Commissioner,* 21 B. T. A. 415; *Tulsa Oxygen Co.* v. *Commissioner,* 18 B. T. A. 1283; *National Pipe & Foundry Company* v. *Commissioner,* 19 B. T. A. 242; G. C. M. 7472, C. B. IX-1, page 184, 190; I. T. 2542, C. B. IX-2, p. 126.

III.

There was an exchange of assets for securities and cash within the meaning of Section 203(e)(1) of the Revenue Act of 1926.

The Board of Tax Appeals held that the transaction here in question constituted a *sale* as distinguished from an *exchange* and that therefore Section 203 (e) (1) was not applicable, although the Board, in its Findings of Fact described the transaction as an "exchange" of assets for cash and notes. (R. 19.)

There is no warrant in the statute or in reason for any such distinction. In fact the words "sale" and "exchange" are not mutually exclusive. Every sale is an exchange although every exchange may not be a sale. Exchanges are not limited to barters but include exchanges for money or currency. In fact money is largely a medium of exchange. However this may be as a general proposition, Congress included in Section 203 all transfers of property for which stock or securities were received in whole or in part. The words "sale" and "exchange" were used interchangeably by the Treasury Department in recommending the legislation, by the Ways and Means Committee of the House, by the Finance Committee of the Senate and by the Treasury Department in its Regulations defining and administering the statute. The form of the transfer of the assets is wholly immaterial. The dis-

tinction made by the Board of Tax Appeals merely results in defeating in large part the purpose of the statute without the slightest warrant in the language of Congress and contrary to its express purpose.

In the "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor", hereinabove quoted at page 13, the expression "selling corporation", "consideration for sale" and "purchase by the new corporation" are used to explain the "exchanges" or non-taxable transactions under Section 203 of the Revenue Act of 1924, which is identical with Section 203 of the Revenue Act of 1926. The Report of the Finance Committee of the Senate was identical with the Report of the Ways and Means Committee of the House, hereinabove quoted at page 14, and it will be observed that those two committees used the expressions "proceeds of the sale" and "corporation which sells its assets in connection with the reorganization" in explaining the non-taxable transfers of property provided for in Section 203.

The Regulations of the Treasury Department also use the term "sale" in describing non-taxable reorganization. Article 1574 of Regulations 65 under the Revenue Act of 1924 reads in part as follows:

> "If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the *sale* of its assets to corporation A, or (2) *the sale of its properties by B to A*, or (3) the *sale* of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or part of its assets to B where immediately after the

transfer A or its shareholders are in control of B, * * *". (Italics supplied)

Article 1574 of Regulations 69 under the Revenue Act of 1926 hereinabove set out at pages 21, 22, is substantially identical. The word "exchange" is not used in any of the examples of a non-taxable reorganization, but the word "sale" is repeatedly used.

In *Appeal of Rodenbough, Executor,* 1 B. T. A. 477, 25 Fed. (2d) 13, it was held that the word "exchange" as used in the Revenue Act of 1918 included an outright sale of the property and the reinvestment of the proceeds in other property. The case related to the interpretation of the provision of the Federal Estate Tax Act which provides that there shall be deducted in determining the principal of the gross estate an amount equal to the value of any property which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent or which can be identified as having been acquired by the decedent in "exchange" for property so received, if an estate tax was collected from such preceding esate. It was held both by the Board of Tax Appeals and the Circuit Court of Appeals that securities which had been purchased with the proceeds of the sale of the securities received from a preceding estate were acquired in *exchange* for the original property within the meaning of the Revenue Act. The Court said (p. 15):

> "A statute must be read in the light of its purpose. *Tucker* v. *Alexander,* 275 U. S. ....., (228), 48 S. Ct. 45, 72 L. Ed.—as it is clear that the Congress intended completely to avoid the inequity of double taxation, we shall, in order to effectuate its intention, give the statute a construction as broad as the intention itself."

Transfers of property for cash and notes are exchanges.

In *Appeal of Somers Lumber Company*, 2 B. T. A. 106, the taxpayer sold a hotel, receiving therefor $25,075.38 in cash and a second mortgage in the amount of $65,000. The Board said in its opinion (p. 108):

> "In the instant case the taxpayer received in exchange for its property a mixed consideration of cash and other property,"

and in holding the transaction taxable, the Board cited Section 202 (b) of the Revenue Act of 1918, which provides that "when property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; * * *."

In the *Appeal of J. S. Cullinan*, 5 B. T. A. 996, the petitioner transferred real estate and received in payment cash and vendor's lien notes. The Board, in its opinion, applied Section 202 (b) of the Revenue Act of 1918, dealing with exchanges.

In *Appeal of Anton M. Meyer*, 3 B. T. A. 1329, the taxpayer sold his interest in a partnership for $100,000 in cash and $175,000 in notes executed by the purchaser. The Board in this case held he came within Section 202 (c) of the Revenue Act of 1921, which provides that "where property is exchanged for other property which has no readily realizable market value, together with money or other property which has a readily realizable market value, then the money or the fair market value of the property having such readily realizable market value received in exchange shall be applied against and reduce the basis, provided in this section, of the property exchanged, and if in excess of such basis, shall be taxable to the extent of the excess; * * *."

In *Ed Foster* v. *Commissioner*, 19 B. T. A. 958, the petitioner transferred certain oil leases for $55,000, receiving one-half in cash and the remainder in an unsecured promissory note. The Board cited Section 202 (b) of the Revenue Act of 1918, above quoted, and stated, (p. 961) "The note in question was property received in exchange for other property within the meaning of the above statute. * * *"

In *Charles A. Rusk, et al.* v. *Commissioner*, 20 B. T. A. 138, the taxpayer sold certain real estate for $250,000, receiving a cash payment of $30,000, the balance of the purchase price being represented by promissory notes of the purchaser secured by a mortgage on the property. The Board, in holding that the transaction was subject to tax, cites Section 202 (c) of the Revenue Act of 1921, which provides the method for computing gain or loss "where property is exchanged for other property."

In *William Parris* v. *Commissioner*, 20 B. T. A. 320, the taxpayer had sold a certain royalty interest for cash and a promissory note. The Board applied Section 202 (b) of the Revenue Act of 1918, which deals with the exchange of property.

We again call attention to the fact that the words "exchange" and "sale" were used interchangeably by the Treasury Department in recommending the legislation, by the Ways and Means Committee of the House and by the Finance Committee of the Senate, that the Treasury Department, in its regulations in construing the particular sections of the 1924 and 1926 Acts, included sales, the rulings of the Board of Tax Appeals, in construing the word "exchange," included transactions identical with the one in this case, and that from time to time after such constructions, Congress re-enacted the identical language

in the Revenue Act of 1926, the Revenue Act of 1928 and the Revenue Act of 1932.

In this case, the transfer of the assets of Petitioner and the Citizens Company was in exchange for cash (all of which went to creditors) and securities. The statute specifically includes the transfer of substantially all of the properties of a corporation for securities and money.

IV.

Notes secured by bonds in turn secured by mortgages on the properties of the maker of the notes are securities.

Securities are something given to secure the payment of money. Probably the most common kind of security is a written promise to pay money secured by some kind of collateral. Respondent has suggested that the notes in this case are not securities because they were merely evidence of the additional amounts due. They not only evidenced an amount due but by reason of the collateral bonds and mortgage *secured* the additional amount due. Every bond, every note, every mortgage, every indenture is given to evidence an agreement to pay and to secure the payment of money at some future time. If one were asked for an example of the term "securities", probably the first example, and the one most likely to be acquiesced in by everyone, would be notes secured by mortgages or, as in this case, notes secured by first mortgage bonds. The Answer of the Commissioner of Internal Revenue, filed by the General Counsel of the Bureau of Internal Revenue, to the Amended Petition to the Board of Tax Appeals, stated that the Respondent "admits that all of the assets of the Petitioner, including ice and cold storage plants, machinery, equipment and certain real estate, were

disposed of during 1926, and that the Petitioner received therefor $400,000 in cash and $1,000,000 in *securities* of the Florida West Coast Ice Company." (R. 11) (Italics ours). It is true that at the hearing before the Board an Amended Answer was filed which did not contain the above admission.

In *Cortland Specialty Company* v. *Commissioner*, 60 Fed. (2d) 937, Circuit Judge Augustus N. Hand intimated that unsecured notes were not securities. We think this intimation is clearly wrong, but it should be borne in mind that in the case at bar the notes were secured by bonds and mortgages on the property of the obligor.

In G. C. M. 2000, VI-2 C. B. 248, the General Counsel held that promissory notes secured by a mortgage constituted securities within the meaning of the Revenue Act, stating at page 250:

> "Bills of exchange, bonds for the payment of money, and promissory notes are in the popular acceptance of the term 'securities' for money. (*Jennings* v. *Davis*, 31 Conn. 134; *Bank of Commerce* v. *Hart*, 37 Neb. 197, 55 N. W. 631.) In *Wagner* v. *Scherer* (85 N. Y. Supp., 894), the Supreme Court of New York (Appellate Division) had before it the question whether a promissory note was a security within the meaning of the New York statute involved, and in rendering its opinion the court stated in part as follows:
>
> > "'In popular acceptation the term "securities" includes promissory notes. (Anderson's Dictionary of Law, page 931.) "Promissory notes, among our people, are regarded as securities for money, more or less valuable; indeed, in proportion as the pecuniary ability and credit of the makers of them, are more or less reliable." (*Jen-*

ings v. *Davis*, 31 Conn. 134, 140.) Under the charter of a bank empowering it to "purchase securities of every kind" it has been held that the term "securities" as therein used meant notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. (*Bank of Commerce* v. *Hart*, 37 Neb. 197, 202, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479.) But the term "securities" embraces promissory notes not only in a popular sense, but in a legal sense as well. This was expressly held by Lord Chancellor Sugden in the case of *Barry* v. *Harding* (1 Jones & Latouche, 475, 483.)'

* * *

"* * * the word 'securities' as used in section 213 (b) 4 of the Revenue Act of 1921 includes not only the farm loan bonds issued by the joint stock land banks but also the first mortgage notes issued by the farmers and payable to these banks."

To the same effect see *First National Bank of Chicago* v. *United States*, 283 U. S. 142. There is no possible distinction between notes secured by a mortgage and notes secured by mortgage bonds.

In G. C. M. 3291 C. B. VII-1, p. 203, the stock of another corporation was acquired in consideration for the acquiring corporation's own stock and its debenture notes payable three months after date. The General Counsel held these debenture notes were securities of a corporation within the meaning of Section 202 of the Revenue Act of 1921, saying, page 204:

"It is apparent that these debenture notes were in fact securities of the O company and were not cash or the equivalent of cash.

> **"It must be concluded that * * * the stockholders of the M company received in place of their stock in that company stock *and securities* in a new company which was a party to a reorganization." (Italics supplied.)**

In *Rosenthal* v. *Brown*, 247 N. Y. 479, 481; 160 N. E. 921, the court said:

> "The word 'securities' in its broadest sense, includes not only bonds and other promises to pay money but also evidences of property such as corporate stocks."

In *J. S. Lang Engineering Company* v. *Commonwealth*, 231 Mass. 367, 371; 120 N. E. 843, the court said:

> "'In its ordinary acceptation the word "securities" includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness or of property, and not mere choses in action.'"

See, also, *Mitchell* v. *Porter* (Tex. Civ. A.), 194 S. W. 981, 985; *Will of Stark*, 149 Wis. 631, 657; 134 N. W. 389; *Whitely* v. *Arbogast*, 17 Ohio Dec. 569, 574; *Peaslee* v. *Rounds*, 77 N. H. 544, 547; 94 Atl. 263; *Bank of Commerce* v. *Hart*, 37 Neb. 197, 202; 55 N. W. 631; *Boston Railroad Holding Company* v. *Commonwealth*, 215 Mass. 493, 496, 497; 102 N. E. 650.

The dictionaries, including the law dictionaries, commonly define "securities" as including evidences of debt, such as notes.

The fact that notes are short term notes does not affect their character as securities was held in *Harriman National Bank* v. *Commissioner of Internal Revenue*, 43 Fed.

(2d) 950, 952. The length of time until the maturity of the security is of no importance. Is there any question that ninety day notes issued by the Treasury Department are securities?

It can make no difference that the transfer was stated to be for a total cash consideration of $1,400,000, $1,000,000 of which was represented by notes. If the entire consideration had been bonds or notes secured by bonds it would have been equally necessary to state the full consideration in terms of money. Even if the agreement did not state the consideration in dollars the bonds or notes would necessarily be stated in dollars. The Board of Tax Appeals held there was an exchange and reorganization in *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242 where the total consideration was stated in dollars although part of the consideration was to be paid in preferred stock.

V.

The $400,000 Cash Used to Pay Petitioner's Debts May Not Be Considered as Taxable Income.

In the Court below, Respondent contended that inasmuch as $400,000 was paid to creditors and not distributed to stockholders, all of it was taxable profit. Section 203 (c) provides in part as follows:

> "(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but
>
> "(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in

excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

The proceeds of the transfer were distributed pursuant to the plan of reorganization, to creditors and to stockholders. It was a part of the agreement that Petitioner's debts should be paid and that the property be transferred free and clear of any encumbrance. $33,000 was advanced prior to the transfer of the property for the express purpose of retiring Petitioner's outstanding bonds (R. 17); $226,000 was paid directly by the acquiring corporation to creditors; $137,000 additional was paid to Petitioner, who, in turn, paid its notes at the bank and other liabilities (Findings of Fact, 17-18). The substance of the transaction in fact was that Petitioner received the secured notes for its equity in the properties. The cash was paid either directly to creditors or through petitioner to creditors. The effect was the same as though the property had been conveyed for $1,000,000 in 6% secured notes, subject to liabilities.

Even if the Petitioner had received the gross consideration without a requirement and understanding that it would pay its outstanding liabilities, it could not have distributed the gross proceeds to the stockholders without payment of its debts. The distribution to stockholders must be the distribution of the net proceeds; otherwise the statute is unworkable. Congress intended to relieve from double taxation where the proceeds of the transfer were properly distributed and not retained by the transferring corporation.

In *National Pipe & Foundry Company* v. *Commissioner*, 19 B. T. A. 242, a part of the proceeds of the sale was used by the transferor to pay its liabilities, but the transaction was held to be a non-taxable reorganization.

In General Counsel's Memorandum 3827, C. B. VII-2, page 114, the General Counsel of the Bureau of Internal Revenue held that part of the consideration received by a transferor might be used to pay expenses of dissolution without making any part of the proceeds of the reorganization taxable.

CONCLUSION.

We believe the proposition has been established that the transaction involved in this case constituted a reorganization within the definition of that term contained in Section 203(h)(1) of the Revenue Act of 1926 and that the decision of the Circuit Court of Appeals for the Fifth Circuit was erroneous; that in all other respects the transaction was one in which neither gain nor loss is recognized under the provisions of Section 203 of the Revenue Act of 1926, and that no income tax can be imposed upon the Petitioner.

It is submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

ALBERT L. HOPKINS,
HARRY B. SUTTER,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner.
1 No. LaSalle Street,
Chicago, Illinois.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

APPENDIX.

Section 203 of the Revenue Act of 1926:

RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely

in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(5) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(c) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph

to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(f) If an exchange would be within the provisions of paragraph (1), (2), (3), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such

paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(g) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of section 201 for the purpose of determining the taxability of subsequent distributions by the corporation.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

FILE COPY

FILED
DEC 12 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 182

PINELLAS ICE & COLD STORAGE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

ALBERT L. HOPKINS,
HARRY B. SUTTER,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner,
1 North LaSalle Street,
Chicago, Illinois.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Reorganization	3
Continuity of interest	6
Stock or securities	9
Plan of reorganization	9
Party to reorganization	10
The amount paid to creditors	11

AUTHORITIES CITED.

Green v. Commissioner, 24 B. T. A. 719	7
Revenue Act of 1926, Sec. 2(b)	11
Revenue Act of 1926, Sec. 203(e)(1)	1
Revenue Act of 1926, Sec. 203(h)(1)	3
G. C. M. 1753, VI-1 C. B., p. 138	7
G. C. M. 8565, IX-2 C. B., p. 127	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 182

PINELLAS ICE & COLD STORAGE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

With great respect, we believe that counsel for Respondent has entirely misunderstood both the meaning and the purpose of Subdivision (e) (1) of Section 203 of the Revenue Act of 1926. The theory of Respondent throughout his brief is that it was the purpose of Congress to "defer" or "postpone" the imposition of a tax on a corporation in cases where the transaction in question was

only a change of form and not of substance. On the assumed "theory" it is then urged that during the "deferment" or "postponement" of tax on the corporation there must be a "continuity of interest" in the transferee corporation. This theory would have a degree of plausibility if the case before the Court were under the statutes as they existed prior to the enactment of the Revenue Act of 1924, or even if the case were under other provisions than Section 203 (e) (1) of the Revenue Acts of 1924 or 1926, which provision is the same in both Acts.

The expressed purpose of Congress was not to *postpone* or to *defer* a tax on the corporation, but to impose one tax and only one tax, and that on the stockholder, where the transaction constituted a transfer of all of the assets of a corporation, a liquidation of the corporation, and distribution of the proceeds to the stockholders. The purpose of Congress was to relieve what was an admittedly unjust and burdensome double taxation. The relief was to be permanent, not a mere postponement. It was pointed out by the Treasury Department, and the Committees of Congress that where the stockholders sold the stock of their corporation to another corporation and the purchaser liquidated the assets of the original corporation, there would be but one tax and that upon the stockholders. The avowed purpose of Congress was that where the same result was accomplished in another manner, there should be the same tax result, that is, one tax and that on the stockholders. (Report of Finance Committee of the Senate; Report of Ways and Means Committee of the House; Statement (by Treasury Department) of Changes made in the Revenue Act of 1921; Petitioner's Brief, page 13 *et seq.*, 20, and 31.)

It is clear that the theory of Respondent's brief is that the purpose of the statute was to defer or postpone recognition of gain or loss and that a continuity of interest should exist during such deferment. The opening sentence of the

summary of argument, page 4 of Respondent's Brief, is as follows:

> "The purpose of the statute was to defer the recognition of gain or loss in any case where an exchange resulted merely in a change of form and not of substance, and all of its provisions should be interpreted to effectuate this underlying purpose."

See similar statements on Pages 9, 11, 12, 15, etc.

The contention that there must be continuity of interest loses its applicability unless the taxable gain or deductible loss is merely deferred until a final disposition of the stock or securities received. The idea is wholly inapplicable to a case where the corporation is liquidated and dissolved and the resulting tax is solely a problem for the stockholders under other provisions of the statute. The double taxation which existed prior to the Revenue Act of 1924 was removed by eliminating the tax on the corporation. In such cases the change is one of substance, not of form, and there need be no continuity of interest where the liquidating corporation is a mere conduit to transfer to its own stockholders the proceeds received from the acquiring corporation. Congress said the result should be the same as if the stockholders had sold their stock and the purchasing corporation had liquidated the transferor corporation; that is, one tax instead of two and that one on the stockholders.

Reorganization.

At the outset, we think it essential to determine whether or not there was a "reorganization" within the meaning of section 203 of the Revenue Act of 1926. Section 203(h)(1) defines a "reorganization"' as being, among other things, "the acquisition by one corporation of * * * substantially all the properties of another corporation." It is petitioner's contention that this definition means exactly what

it says; that the acquisition by one corporation of substantially all of the assets of another corporation of itself constitutes a statutory reorganization. In Petitioner's Brief, pages 15-28, we pointed out that this has been the interpretation by the Treasury Department and by the Board of Tax Appeals. We are somewhat at a loss to understand whether Respondent now proposes that such interpretation should be changed. In his brief, page 16, Respondent says:

> "We are informed that the consistent administrative construction of section 203 (h)(1)(A) by the Treasury Department has always been that the acquisition of substantially all the property of a corporation (even though not amounting to a merger or consolidation) is a 'reorganization' within the statute, provided the transaction meets the other statutory requirements."

It will be noted that counsel added the words "provided the transaction meets the other statutory requirements." It is respectfully submitted that the statutory definition of a "reorganization" is complete in itself and defines a reorganization regardless of the tax result. The definitions of "reorganization" by the Treasury Department and by the Board of Tax Appeals were not limited with any provisos, and counsel now point out that the interpretation by the Treasury Department is probably the correct one and that the Circuit Court of Appeals for the Fifth Circuit, if it held otherwise, was probably incorrect. We do not think that from a reading of the opinion of the Court below there can be any doubt that it did predicate its decision upon an interpretation of the definition of a "reorganization" different from that now contended for by both petitioner and respondent.

There being a reorganization, we then look to other provisions of the statute for the ensuing tax result. Whether

or not there is a taxable profit or deductible loss and upon or by whom, must be determined from other provisions of the statute. Counsel for respondent is contending that whether or not there is a "reorganization" within the statute depends upon how the acquisition of all of the assets of another corporation took place. We have pointed out (Petitioner's Brief, page 30, *et seq.*) that it makes no difference how the assets of the transferor corporation were acquired by the transferee. The name for the transaction is of no importance. Whether the instrument transferring the assets be called "exchange," "sale," "conveyance" or any other word describing the transfer of the assets from one person to another is wholly immaterial. It was in support of this statement that we cited the language of the Treasury Department in its proposals to Congress, the language of the Finance Committee of the Senate, of the Ways and Means Committee of the House, and of the Regulations of the Treasury Department in interpreting the statute showing that the words "sale" and "exchange" were used interchangeably in listing and defining the kind of transactions which constituted a statutory reorganization.

We consider it of no importance whether the particular transaction in this case be called a "sale" or not. It was undoubtedly an exchange. (Petitioner's Brief, pages 30-35) The "exchange" or "sale" or whatever it may be called in this case, however, was not a transfer of property solely for cash but was in fact a transfer in consideration for $400,000.00 paid in part directly to petitioner's creditors and in part to petitioner for the expressed purpose of paying its creditors, and $1,000,000 in promissory notes *secured* by first mortgage bonds not only on the property owned by petitioner but on all the property of the Florida West Coast Ice Company, the transferee. The argument suggested by counsel for respondent with reference to a transfer solely for cash is inapplicable to the case at bar.

Having a statutory reorganization by the transfer of substantially all of the assets of one corporation to another, we then look to other provisions of the section to ascertain the taxable effect of the transaction. If property held for productive use in trade or business is transferred for like property, there is no tax under (b)(1). If stock or securities are exchanged for stock or securities in such corporation or another corporation a party to a reorganization, there is no tax under (b)(2). If property of a corporation is transferred solely for stock or securities to another corporation a party to a reorganization, there is no tax under (b)(3). If the transferor corporation receives in addition to non-taxable proceeds, money or other property, and keeps them, the gain is subject to tax, but not to exceed the money or other property received (subdivision (d)(1)). If, on the other hand, there is a distribution to the stockholders, there is no tax on the corporation (subdivision (e)(1)) and that is the case at bar. If the transferor corporation receives money or other property with the stock or securities, it may not take a loss (subdivision (f)).

CONTINUITY OF INTEREST.

The necessity of continuity of interest in order to constitute a reorganization does not exist in the statute except where it is specifically so provided. The statutory definition of reorganization was first adopted in the Revenue Act of 1921. Senator Simmons, then Chairman of the Finance Committee of the Senate, in discussing the following language:

> "a majority of the voting and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all of the stock of another corporation * * *"

said:

> "That is in the disjunctive 'or of substantially all of the properties, * * *'."

This language was quoted by the General Counsel of the Bureau of Internal Revenue and the construction adopted by him in G. C. M. 8565, IX-2 C. B. 127.

The General Counsel said in another ruling, promulgated in 1927 (G. C. M. 1753, VI-1 C. B. 138):

> "For example, a transfer of all the assets of a corporation constitutes a reorganization under the second part of definition (A) irrespective of the element of 80 per cent control demanded by definition (B)."

This language was quoted and followed by the Board of Tax Appeals in *Green v. Commissioner*, 24 B. T. A. 719, at 725.

In defining the word "reorganization" the Treasury Department in its Regulations, the Commissioner of Internal Revenue, the General Counsel of the Bureau of Internal Revenue, and the Board of Tax Appeals have stated that a reorganization took place where one corporation acquired substantially all of the assets of another corporation, and this without regard to any element of control or percentage of stock. (Petitioner's Brief, pages 21-27) It is true that in some of the cases stock was received. It may have been common and not preferred; it may have been preferred and not common. There was no requirement as to any particular percentage. The test of reorganization was based entirely upon the acquisition of substantially all of the assets.

Whatever applicable requirement of continuity there may be in the statute must be found in subdivision (b)(3) and in subdivision (e). Those sections of the statute say "stock or securities". Again it must be noted that this is in the disjunctive, and not the conjunctive as the expression is used occasionally by Respondent in his brief. The fact that securities alone are sufficient completely negatives the idea of continuity of interest. Bonds, notes, or other indebtedness constitute the holder thereof a creditor, not a proprietor. The holder of such obligations is not in control

and his rights are to receive the amount of money promised to be paid when and as due, and in default thereof to pursue his legal rights, to realize on his collateral, if any, or to collect his debt if he can.

What then is this continuity of interest? Under the statute it may be either stock or securities. As pointed out, no particular percentage of either is required. It is something shadowy and ephemeral. Construed as counsel for Respondent suggest, that the idea of continuity of interest is a limitation upon the definition of "reorganization", and without any idea as to how much stock or how much in amount of securities is necessary for that continuity of interest, the statute is impossible of construction. The percentage of stock or securities of the total proceeds received by the transferor may be great or small, and the percentage of the stock or securities of the total outstanding of the transferee corporation may be infinitesimal. Would one share of stock out of General Motors' 40,000,000 shares be "continuity of interest"? Would one debenture or bond or other promise to pay of small denomination be "continuity of interest"?

We believe that properly construed, the statute provides for all such contingencies, is perfectly definite and has no such anomalous or grotesque results. As suggested above, the various subdivisions of section 203 completely provide for the taxable effect, gain or loss as the case may be, in every case. For example: exchange of property for property, no gain or loss; exchange of stock or securities for stock or securities, no gain or loss; exchange of property solely for stock or securities, no gain or loss; exchange of property for stock or securities and money, if retained by the transferor, a taxable gain not to exceed the money; transfer of property for stock or securities and money, and liquidated to stockholders, no tax to the corporation but only to the stockholders. It will thus be seen that whether the percentage of cash to stock or securities is large or

small, the statute adequately provides for its taxable effect. If the percentage of money received is small, there may be some taxable gain but not the full amount of the profit, leaving to the disposition of the stock or securities the final ascertainment of the gain. If the percentage of the money received be large, the full amount of the profit may be taxed either in the hands of the corporation, if not distributed, or in the hands of the stockholders, if distributed.

Stock or securities.

Respondent contends that the notes in this case, although secured by bonds in turn secured by a first mortgage on all of the properties of the transferee, including properties from another corporation, are not securities; that even though such notes may be securities in the general acceptation of the word they should not be so considered in this case. He suggests that the statute does not mean purchase money obligations. It would seem that where the statute is discussing the transfer of assets for securities, purchase money obligations would be the thing primarily contemplated. He then suggests that the word "securities" should not apply to comparatively short-term obligations. A short-term note may or may not be the equivalent of cash. On Respondent's own theory of a postponement or deferment of tax until the securities are realized upon, the sooner the notes are paid the sooner profit is subject to tax. It is true that the Board of Tax Appeals said that the notes in this case were not securities within the meaning of this statute, but that conclusion was reached entirely because the Board held there was a difference between an exchange and a sale.

Plan of reorganization.

Counsel in his brief, page 20, states:

> "The record contains no express finding that the transfer of Petitioner's assets in this case was pursuant to any 'plan of reorganization'."

In answer to this, it is only necessary to quote the following language from the findings of fact made by the Board of Tax Appeals:

> **"The transfer of the assets of petitioner to the Florida West Coast Ice Company in exchange for cash and notes, the distribution in liquidation of the proceeds thereof to the stockholders of petitioner and the dissolution of petitioner were made in accordance with and pursuant to a *plan* of the officers and stockholders of petitioner, which *plan* was formulated prior to the execution of the agreements of November 4, 1926, between Citizens Ice & Cold Storage Company and National Public Service Corporation." (R. 19) (our italics)**

Counsel said that the "plan" was the transferee's plan. The transfer of substantially all of the property of petitioner and of Citizens Ice & Cold Storage Company for cash and notes of a new corporation to be formed and the liquidation and dissolution of the two transferor corporations was the "plan" of petitioner and Citizens Ice Company.

PARTY TO REORGANIZATION.

It is further stated that petitioner was not a party to the reorganization. We repeat petitioner was not only a party but a necessary party to the transaction which in fact took place. Counsel refers to subdivision (h)(2) of section 203 which states:

> "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Section 2(b) of the Revenue Act of 1926 states:

> **"The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."**

The words "include" and "including" in this section have properly been defined as words of enlargement rather than restriction. Paragraph (h)(2) above quoted was necessary in order to include the particular parties therein described. The section means that in addition to all persons who were in fact parties, there shall be included the persons described in that paragraph.

THE AMOUNT PAID TO CREDITORS.

Counsel makes much of the fact that the $400,000.00 cash provided for in the contract was paid to creditors instead of to stockholders.

This point is discussed in Petitioner's Brief, pages 39-41. The substance of the transaction was a transfer of substantially all of Petitioner's assets, free of indebtedness and liens, for secured notes of another corporation. Obviously, only the net proceeds of a transfer may be distributed to stockholders. Counsel, however, state, "so much of the profit from the sale as is used in the payment of debts will never be taxed unless it is taxed to the corporation for it never reaches the stockholders and it is not taxable as such to the creditors." This statement is clearly inaccurate. The statute imposes only one tax and that on the stockholders and the amount of each stockholder's profit is determined by comparing his cost with his realization. The fact that part of the corporation's consideration was used to pay its indebtedness makes no difference in the amount of the stockholders' profit. The debts must be paid in order to determine the amount distributable to the stockholders, otherwise the stockholders would receive a distri-

bution subject to the liabilities. If the gross proceeds of the transfer were distributed to the stockholders subject to the liability to pay the current debts, the result would be exactly the same and counsel would have no basis for the point.

In stating that the money paid to creditors would escape taxation counsel assume that the corporation is taxable, which is the question before the court. Even so, upon what theory is it assumed that money paid to the creditors is the profit. Normally the contrary would be the fact. The creditors must be paid and the balance, if any, must be looked to for the profit. Of course, assuming that the corporation were subject to tax, in determining its profit the amount paid to its creditors is and was taken into consideration in ascertaining the proceeds of the transfer.

Respectfully submitted,

ALBERT L. HOPKINS,
HARRY B. SUTTER,
JAY C. HALLS,
PETER L. WENTZ,
Attorneys for Petitioner,
1 North LaSalle Street,
Chicago, Illinois.

HOPKINS, SUTTER, HALLS & DEWOLFE,
Of Counsel.

FILED
AUG 11 1932

FILE COPY

No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1932

PINELLAS ICE AND COLD STORAGE COMPANY, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	4
Conclusion	12
Appendix A	13
Appendix B	20

CITATIONS

Case:	
Cortland Specialty Co. v. *Burnet*, decided July 29, 1932	10, 20
Statutes:	
Revenue Act of 1924, c. 234, 43 Stat. 253, 256, Sec. 203 (U. S. C., Title 26, Sec. 934)	7
Revenue Act of 1926, c. 27, 44 Stat. 9, 11, 12, 13, 14—	
Sec. 202 (U. S. C. Sup. V, Title 26, Sec. 933)	13
Sec. 203 (U. S. C. Sup. V, Title 26, Sec. 934)	13
Miscellaneous:	
Treasury Regulations 65—	
Article 1574	8
Article 1575	19
Treasury Regulations 69—	
Article 1574	7
Article 1575	17
G. C. M. 2000, VI–2, C. B. 248	8
G. C. M. 3291, VII–1 C. B. 203	8
G. C. M. 3827, VII–2, C. B. 114	8
G. C. M. 7472, IX–1 C. B. 184	8
G. C. M. 8565, IX–2 C. B. 127	8
I. T. 2542, IX–2 C. B. 126	8

133636—32——1

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 30–34) is reported in 21 B. T. A. 425. The opinion of the Circuit Court of Appeals (R. 42–45) is reported in 57 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 29, 1932. (R. 45.) The petition for certiorari was filed June 27, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, a corporation, transferred substantially all its property to another corporation in return for a cash down payment and deferred installments, the latter being evidenced by notes of the transferee secured by its bonds. The question is whether petitioner is relieved from taxation on the gain realized from the transaction by the exceptions to Section 203 (a) of the Revenue Act of 1926, *infra*, pp. 13–17.

STATUTES INVOLVED AND REGULATIONS

These are printed in ~~the~~ Appendix A, *infra*, pp. 13–19.

STATEMENT

This was a petition to the Circuit Court of Appeals for the Fifth Circuit to review an order of the Board of Tax Appeals upholding respondent's determination of a deficiency of $74,673.50 in petitioner's income taxes for 1926. The facts found by the Board of Tax Appeals (R. 22–30) may be summarized as follows:

Petitioner, a Florida corporation, was engaged in the manufacture and sale of ice. Substantially the same stockholders controlled it and the Citizens Ice & Cold Storage Company, a corporation engaged in the same business in the same locality. (R. 22.) The directors and stockholders of both companies were anxious to dispose of all the property of the two companies and then to discontinue business, dissolve the corporations, and distribute the proceeds. Pursuant to this plan one Lewis,

general manager of both companies, in 1926 began negotiations for the sale of the business and property of the two companies. (R. 22–23.)

By written agreement of November 4, 1926, petitioner agreed to sell to the National Public Service Corporation more than 99% of its total property for $1,400,000, of which $400,000 was to be paid in 1926 and the remainder in installments during 1927. (R. 23–25, 30.) The purchaser agreed to form a new Florida corporation and to cause it to take title to the property sold. (R. 26.) The deferred installments of the purchase price were to be evidenced by notes of either the National Corporation or the new corporation, secured by the mortgage bonds of the new corporation or other satisfactory collateral. (R. 25.) An agreement of similar import was executed by the Citizens Company and the National Corporation. (R. 27.)

The National Corporation then organized the Florida West Coast Ice Company (R. 27), and on December 17, 1926, the transactions were closed. Petitioner and the Citizens Company delivered instruments of transfer made out to the Florida Company; cash was paid as provided; and notes of the Florida Company were given for the deferred installments. Bonds of the Florida Company secured by the properties acquired from petitioner and the Citizens Company were given as collateral for the notes. The cash was used to pay petitioner's creditors. The Citizens Company

agreement was carried out at the same time. (R. 27–28.)

In January, 1927, pursuant to the plan mentioned above, the stockholders and directors of petitioner and the Citizens Company adopted formal resolutions for the dissolution of the corporations and the distribution of their assets. When the Florida Company paid its notes to petitioner, the proceeds were immediately distributed to its stockholders as liquidating dividends. After retaining a small sum to meet contingent liabilities, the remaining assets of petitioner (less than 1%) were turned over to a holding company organized in 1927, as trustee for petitioner's stockholders. (R. 29–30.)

The Commissioner determined that petitioner had realized a profit of $552,144.12 on the transaction, and accordingly asserted the deficiency in question. (R. 30.) This action was upheld by the Board (R. 30–34) and the Circuit Court of Appeals (R. 42–45).

ARGUMENT

Section 203 (a) of the Revenue Act of 1926 (*infra*, p. 13) provides that upon the sale or exchange of property the entire amount of the gain or loss shall be recognized, except as specifically provided in later subdivisions of the same section. Section 203 (b) (3) (*infra*, p. 14) provides that no gain or loss shall be recognized if a corporation a

party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization. Section 203 (e) (1) (*infra*, p. 15) provides that if an exchange would be within the provisions of Section 203 (b) (3) but for the fact that the property received in exchange consists not only of stock or securities but also of other property or money, then if such other property or money is distributed in pursuance of the plan of reorganization no gain to the corporation is to be recognized from the exchange. Section 203 (h) (1) (*infra*, p. 16) defines the word "reorganization."

It is thus apparent that the following elements must coexist in order to make a transaction nontaxable within Section 203 (e) (1): A plan of reorganization; an exchange for stock or securities and other property (not a sale for money only); a reorganization to which the corporation seeking exemption from tax is a party; and distribution of the cash or other property pursuant to the plan of reorganization. If any one of these elements is lacking, the transaction does not fall within the exception and is therefore taxable. Petitioner contends that all these elements are present in the instant case.

The Board of Tax Appeals interpreted the contract, pursuant to which petitioner's property was

disposed of, as providing for a sale of the property for money. It pointed out that the consideration for petitioner's property was to be paid in cash and that the notes received by petitioner were merely evidence of deferred payments to be made in cash and were not themselves received as payment. It therefore held that the transaction was not an exchange for cash and securities within Section 203 (e) (1). (R. 30–34.) We believe that the Board's interpretation of the transaction as not being an exchange for cash and securities was correct, and that that is an adequate ground upon which to rest the case. There is no conflict of decisions with respect to this ground, and we submit that the question of the proper interpretation of the transaction is not of sufficient general importance to warrant review by this Court. The grounds upon which the court below placed its decision are discussed *infra*, pp. 9–12.

Petitioner contends that the statute, read in the light of its legislative history and administrative interpretation, does not distinguish between sale and exchange. But we are not now concerned with the question whether Congress intended to make a technical distinction between sales and exchanges. Our position is that one of the requisites provided by the statute is that the consideration for the transfer of assets shall consist of stock or securities in addition to cash or other property, and that the transaction involved in the present case does not

satisfy this requirement. As we shall show, both the legislative history of the statute and the administrative interpretation state this requirement.

In support of its contention petitioner quotes from what it states to be the legislative history of Section 203 of the Revenue Act of 1924 (43 Stat. 253, 256, U. S. C. Title 26, Sec. 934), which was identical with Section 203 of the 1926 Act. (Pet. Br. 15–16.) It is true that the Statement of Changes Made in the Revenue Act of 1921, which was prepared by the Treasury Department, supports the view that a transfer of assets for cash may be nontaxable. But it does not appear that this report was accepted by the Senate or House; and petitioner's quotation from the report of the House Committee on Ways and Means (Pet. Br. 16) shows that Congress took a contrary view by limiting Section 203 (e) (1) to transfers "for stock and securities * * * *and* cash." (Italics ours.)

Although it does not appear from petitioner's abbreviated quotations of the Regulations (Pet. Br. 17–19), the requirement that stock or securities in addition to cash or other property be received in exchange for the transfer of the assets is retained in them. Thus, Article 1574 of Regulations 69, after setting out the hypothetical cases quoted by petitioner (Pet. Br. 18–19), provides—

> then no taxable income is received from the transaction by corporation A or B *if the sole consideration for the transfer of the assets is stock or securities of corporation A or B;* and no taxable income is received from the transaction by the shareholders of either

corporation A or corporation B *if the sole consideration received by the shareholders is stock or securities of corporation A or B.* (Italics ours.)

A similar limitation is contained in Article 1574 of Regulations 65, quoted in part by petitioner. (Pet. Br. 17–18.) As these Regulations obviously deal with transfers for which the sole consideration is stock or securities, they would seem to have no bearing upon the present case. There is no Regulation which provides that a transfer in return for cash alone is exempted from taxation by Section 203.

Article 1575 of Regulations 65 and 69 (*infra*, pp. 17–19) deals with transfers in consideration of stock ~~and~~ securities *and* other property and provides that transfers of property in return for stock or securities *and* money or other property, where all the other conditions of the statute are satisfied, are nontaxable if the other property or money received is distributed pursuant to the plan of reorganization. The administrative rulings cited by petitioner (Pet. Br. 19, 23) also do not help it.[1]

[1] In G. C. M. 3827, VII–2 C. B. 114, the taxpayer transferred its business in exchange for preferred stock and cash. In G. C. M. 7472, IX–1 C. B. 184, assets were exchanged for stock. In I. T. 2542, IX–2 C. B. 126, stock was exchanged for stock. In G. C. M. 3291, VII–1 C. B. 203, stock in one corporation was exchanged for stock and debenture notes in another. While G. C. M. 2000, VI–2 C. B. 248, held farmers' mortgage notes to be securities under the Federal Farm Loan Act, the question arose under Section 234 (a) (2) of the Revenue Act of 1921, and no question was raised with respect to transfers under Section 203. In G. C. M. 8565, IX–2 C. B. 127, the gain upon the transaction was held taxable.

We submit that, as the Board has held (R. 32–33), the transfer in this case does not come within the statute (or the Regulations) since the consideration was not stock or securities in addition to cash. Petitioner transferred its assets in return for a down payment in cash and deferred installments of the purchase price to be paid in cash. At the time of the transfer petitioner received notes of the transferee in the amount of the deferred installments. But these notes were not "securities" within the statute, since it was expressly agreed between the parties that the notes were given merely to evidence the deferred installments of the purchase price, which under the contract of November 4, 1926, were required to be paid in cash. As the notes were not accepted as payment, but merely as evidence of the deferred payments, it is unnecessary to discuss whether notes may be securities within the statute when they are themselves accepted as payment. Since one of the requirements of Section 203 (c) (1), receipt of stock or securities, was lacking, we submit that the Commissioner correctly held the transaction involved in the present case to be taxable.

The Circuit Court of Appeals apparently considered that the transaction was a sale and not an exchange, but went on to point out that a "reorganization" is an essential element in the transaction which constitutes a tax-free exchange under the statute, and that in the case at bar, although there was an acquisition by one corporation of substantially all the property of the other, there was no

reorganization because the transaction was not of the nature of a "merger" or "consolidation," as those words are generally understood.

We are informed that the consistent administrative construction of Section 203 (h) (1) (A) by the Treasury Department has always been that the acquisition of substantially all the property of a corporation is a "reorganization" within the meaning of the statute, provided the other conditions of the statute are met. We are also informed by the Treasury Department that in thus construing the statute it has attempted to give proper effect to the parenthetical clause in Section 203 (h)(1)(A) and, therefore, has not been and is not restricting the meaning of Section 203 (h)(1)(A) in accordance with the conclusion of the court below, in so far as it may be regarded as giving no effect to the parenthetical clause.

Section 203 (h) (1) (A) was recently under consideration by the Circuit Court of Appeals for the Second Circuit in *Cortland Specialty Co.* v. *Burnet,* decided July 29, 1932, which is printed in full in Appendix B, *infra,* pp. 20–29. The court there held that there is a "reorganization" within the meaning of the statute if after a transfer by one corporation to another of substantially all its property, the transferor continues to have some interest in the property of the transferee. Except in so far as it held that short-term negotiable notes did not give such an interest, the Second Circuit has left open the question of the nature of the interest of the transferor which is necessary to make

a transaction a reorganization within the statute. Although citing the decision of the court below in the instant case with approval, the court in the *Cortland Specialty Co.* case does not seem to have limited Section 203 (h) (1) (A) to cases where there is a technical merger or consolidation.

While as set forth above the court below apparently placed its decision on the ground that a technical merger or consolidation is necessary to a reorganization under Section 203 (h) (1) (A), the limits of the decision are not entirely clear. If the opinion below should be construed as meaning that a reorganization within the statute exists if there be a continuity of interest, then it is in harmony with the views of the Circuit Court of Appeals for the Second Circuit. If, on the other hand, it should be construed as requiring a merger or consolidation in the technical sense, then it is to that extent in conflict with administrative construction and with the decision of the Second Circuit.

We are informed by the Treasury Department that the question whether a transfer of substantially all the property of a corporation without a technical merger or consolidation is a "reorganization" within Section 203, is one of importance in the administration of the law, as a large number of cases have already been disposed of by the Bureau of Internal Revenue upon the basis of the administrative construction mentioned above and the question is involved in many matters pending in the Bureau. In view of this fact and of the pos-

sible conflict of the decision below with the consistent administrative construction and the decision of the Second Circuit and the resulting confusion, we should not oppose the instant petition were it not that the case may be adequately rested on the ground stated by the Board of Tax Appeals and discussed above, which we believe correct and as to which there is no conflict of decisions. It therefore appears that if certiorari were granted in the present case, it could be decided on that ground without consideration of the definition of "reorganization" in Section 203 (h) (1) (A). Hence we oppose the instant petition, although we feel that the question of the proper interpretation of Section 203 (h) (1) (A), outlined above, is one of sufficient general importance to merit review by this court.

CONCLUSION

The petition should be denied for the reasons above stated.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
FRANCIS H. HORAN,
Special Assistants to the Attorney General.
WILBUR H. FRIEDMAN,
Attorney.

AUGUST, 1932.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9, 11, 12, 13, 14:

SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

* * * * *

[U. S. C. Sup. V, Title 26, Sec. 933.]

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade

or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(c) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from

the receipt of such stock or securities shall be recognized.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(f) If an exchange would be within the provisions of paragraph (1), (2), (3), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(g) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of section 201 for the purpose of determining the taxability of subsequent distributions by the corporation.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after

the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

[U. S. C. Sup. V, Title 26, Sec. 934.]

Article 1575 of Treasury Regulations 69, under the Revenue Act of 1926, is as follows:

Exchanges in reorganizations for stock or securities and other property or money. If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged for stock or securities in such corporation or in another corporation a party to the reorganiation and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property. No loss from such an exchange will be recognized, however. (See section 203 (f).) If a distribution of property or money in the course of a reorganization is otherwise within the provisions of this para-

graph, but has the effect of the distribution of a taxable dividend, there shall be taxed to each distributee (1) as a divided, such an amount of the gain recognized under this paragraph as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and (2) as a gain from the exchange of property, the remainder of the gain recognized under this paragraph.

Examples.—(1) A, in connection with a reorganization, exchanges in 1925 a share of stock in the X company, purchased in 1918 for $100, for (a) a share of stock in the Y company a party to the reorganization, which has a fair market value of $90, and (b) $20 cash. The gain from the transaction, $10, is recognized and taxed to A. See article 1596 for the basis for determining gain or loss from a subsequent sale.

(2) The X corporation has a capital of $100,000 and earnings and profits of $50,000 accumulated since February 28, 1913. The X corporation in 1925 transfers all its assets to the Y corporation in exchange for the issuance of all Y's stock and the payment of $50,000 in cash to the shareholders of corporation X. A, who owns one share of stock in X, for which he paid $100, receives a share of stock in Y worth $100 and in addition $50 in cash. A will be liable to the surtax on $50.

If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money

> received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized. If the other property or money received by the corporation is not distributed by it pursuant to the plan of reorganization, the gain, if any, to the corporation from the exchange will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property so received which is not distributed. In either case no loss from the exchange will be recognized. (See section 203 (f).)

Article 1575 of Treasury Regulations 65, under the 1924 Act, is substantially identical with the above.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Cortland Specialty Company, Mrs. H. R. Sargent, H. R. Sargent, Petitioners, *against* Commissioner of Internal Revenue, Respondent

OPINION RENDERED JULY 29, 1932

Before: L. HAND, AUGUSTUS N. HAND AND CHASE, *Circuit Judges.*

Appeal from orders of the United States Board of Tax Appeals.

From orders of the Board of Tax Appeals determining a tax deficiency of $13,412.82 against the petitioners Cortland Specialty Company, Mrs. H. R. Sargent and H. R. Sargent, respectively, each of said petitioners appeals. Affirmed.

AUGUSTUS N. HAND, *Circuit Judge:*

The question raised by this appeal is whether the transfer by Cortland Specialty Company to Deyo Oil Company, Inc., hereinafter described was a reorganization within the meaning of Section 203 (h) (1) of the Revenue Act of 1926 which relieved the Cortland Company from paying an income tax upon any gain that might result therefrom or whether the transfer was a mere sale which subjected the transferor to a tax on any profit which it realized. The Cortland Company made its return

upon the theory that the transfer was in effect a reorganization. The Commissioner held that it was nothing but a sale and assessed a tax deficiency against it for the year 1925 in the sum of $13,412.82 because of a profit of $101,175.58 over the depreciated cost of the property transferred. A similar tax deficiency was assessed against Mr. and Mrs. Sargent as transferees of the assets of the Cortland Company. Their liability is undisputed in case that of the Company should stand. The Board of Tax Appeals affirmed the action of the Commissioner.

During the year 1925 the Cortland Company was engaged in the business of buying and selling petroleum products. Herbert R. Sargent and his wife Bertha C. Sargent were the sole owners of its stock. Mr. Sargent was the president, treasurer, and general manager, and Mrs. Sargent was the secretary. The Deyo Oil Company was a corporation engaged in the same business and each of the companies were New York corporations. On September 26, 1925, agreements were entered into between the Cortland Company and Deyo Company, and by Sargent and the latter, whereby the greater part of the assets of the Cortland Company were turned over to the Deyo Company, the Cortland Company agreed to discontinue business after October 1, 1925, and Sargent became the general manager of the business of the Deyo Company in the territory previously served by the Cortland Company. The assets to be transferred under the contract were:

(1) Real property, leases, and physical equipment of Cortland.

(2) Merchantable petroleum products of Cortland.

The consideration for the transfer, according to the contract, was:

Payments by Deyo for real property, leases and physical equipment of business made under Articles "First" and "Third" of the contract of transfer:

Cash		$53,070.00
Promissory notes of Deyo, each dated October 1, 1925, and payable:		
December 1, 1925	$35,500.00	
January 1, 1926	21,300.00	
March 1, 1926	26,625.00	
June 1, 1926	26,625.00	
September 1, 1926	26,625.00	
December 1, 1926	23,075.00	
Total notes		159,750.00
		212,820.00
Payment by Deyo, on October 9, 1925, for merchantable petroleum products purchased from Cortland under Article "Fourth" of the Contract		23,803.82
Total receipts by Cortland on account of transfer		236,623.82

The $53,070 of cash paid by Deyo to Cortland, and the $159,750 in notes of Deyo, were distributed by Cortland to Mr. and Mrs. Sargent, its sole stockholders, shortly after the transfer occurred. They collected the notes as they fell due, the note for $21,300 payable December 1, 1925, on that date, and the remaining notes when they matured in 1926.

The Cortland Company proceeded to liquidate its accounts receivable and trade notes and other property not included in the transfer to Deyo, to pay its debts, and in general to prepare for dissolution which occurred June 30, 1926.

The following assets of Cortland were not transferable to Deyo under the contract with the latter:

Accounts and trade notes receivable amounting to about	$60,000.00
Stock of garage company valued at	4,000.00
Estimated cash on hand, not included in transfer	14,000.00
Total assets not transferred under contract	78,000.00
Amount owing by Cortland to its creditors was	56,000.00
Net amount of assets of Cortland not covered by contract with Deyo	22,000.00

From the foregoing, it is probable that, in view of an immediate proposed distribution by Cortland to its stockholders and of the possibility of poor returns from the $60,000 of accounts, Cortland omitted from the contract the $78,000 of assets in order safely to pay its own creditors, and relied on the assets which it retained and the amount which its petroleum products sold to Deyo would later yield, to care for its existing obligations and for further expenses connected with the transfer and the dissolution proceedings.

The net result of its transactions was to transfer to Deyo assets amounting to $236,623.82, and to withhold net assets from the transfer of $22,000.00; making its total assets at the date of transfer equal $258,623.82.

The foregoing tabulation shows that about 91½% of Cortland's assets were transferred to Deyo and only about 8½% were retained. There can be no doubt that by the transfer Deyo acquired substantially all the properties of Cortland and so the Board of Tax Appeals found.

Whether the above transfer of real property, leases, and equipment was a sale resulting in a gain on which Cortland was taxable, or whether it represented an exchange in pursuance of a "plan of reorganization" on which no gain should be recognized, depends on the effect to be given to the

provisions of Section 203 of the Revenue Act of 1926.

It may be said at the outset that the contract of Cortland with Deyo and the corporate resolution authorizing it to be made treat the transfer to the latter as a sale. The instrument begins by reciting that Cortland "has determined * * * to sell and dispose of all its physical and tangible assets" and that Deyo "has determined to purchase said assets." It goes on to say that Cortland "agrees to sell, transfer and convey * * * all and singular its real property, interests in real property, leases of real property * * * and equipment * * *", and later to say that it "shall sell * * * all of the merchantable gasoline, kerosene, oils and other petroleum products" and that Deyo "agrees to pay" the "purchase price of $213,000.00" for the "real property * * * and equipment" and a further "purchase price" to be determined by "an inventory taken at prevailing cost prices" for the "petroleum products." Nothing is said about the acquisition of any vested interest by Cortland or its stockholders in the business or assets of Deyo, but, on the contrary, it is provided that their interest shall be completely severed for, under Article "Fifth" of the contract, Cortland is "not to engage in the business of buying, selling or dealing in gasoline, kerosene or other petroleum products from and after October 1st, 1925" and is to receive nothing but cash and short-time promissory notes as the consideration for the business and property sold. The transaction certainly bore all the characteristics of a simple sale.

But it is argued that under Subdivisions (e) and (e)(1) of Section 203 of the Revenue Act of 1926 "no gain or loss shall be recognized if a corporation, a party to a reorganization" distributes "stock or securities" and "money" "in pursuance of the plan of reorganization," and that under Subdivision (h) (1) (A) of the section the term "reorganization" is defined broadly enough to exempt Cortland from a profit tax on its transfer. In (h) (1) (A) a reorganization is defined as *"a merger or consolidation"* and the subdivision goes on to say that "merger or consolidation" *include* "the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation." If the last clause means that any transfer of "substantially all the properties" of one corporation to another corporation is a reorganization, the position of Cortland is strong; but we do not regard such an interpretation as warranted.

Reorganization, merger, and consolidation are words indicating corporate readjustments of existing interests. They all differ fundamentally from a sale where the vendor corporation parts with its interest for cash and receives nothing more. Reorganization in the most ordinary sense suggests "the formation of a new corporation that is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale." Morawetz Corp. §812; *Symmes* v. *Union Trust Co.*, 60 Fed. 870. While the term includes

financial readjustments in ways other than by judicial sale it does not properly embrace mere purchases by one company of the assets of another. *Little Rock Chamber of Commerce* v. *Reliable Furniture Co.* (*Ark.*) 211 S. W. 371. Reorganization is defined in (h) (1) (A) as including "a merger or consolidation." A merger ordinarily is an absorption by one corporation of the properties and franchises of another whose stock it has acquired. The merged corporation ceases to exist and the merging corporation alone survives. A consolidation involves a dissolution of the companies consolidating and a transfer of corporate assets and franchises to a new company. In each case interests of the stockholders and creditors of any company which disappears remain and are retained against the surviving or newly created company. *Railroad Company* v. *Georgia,* 98 U. S. at p. 362; *Matter of Bergdorf,* 206 N. Y. 309; *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 57 Fed. (2d) 188; *Royal Palm Soap Co.* v. *Seaboard Air Line Ry. Co.,* 296 Fed. 448; *Lee* v. *Atlantic Coast Line,* 150 Fed. 775. Undoubtedly such statutes vary in the different states particularly in respect to how far the constituent companies may be deemed to survive the creation of the new or modified corporate structure, but we believe that the general purpose of them all has been to continue the interests of those owning enterprises, which have been merged or consolidated, in another corporate form. A sale of the assets of one corporation to another for cash without the retention of any interest by the seller in the purchaser is quite outside the objects of merger and consolidation statutes.

Section 203 of the Revenue Act of 1926 must be interpreted in this setting. Its purpose was to relieve those interested in corporations from profits taxes in cases where there was only a change in the corporate form in which business was conducted without an actual realization of any gain from an exchange of properties. When describing the kind of change in corporate structure that permits exemption from these taxes, Section 203 does not disregard the necessity of continuity of interests under modified corporate forms. Such is the purpose of the word "reorganization" in Sec. 203 (b) (3) where a corporation exchanges its property "solely for stock or securities." Such also is the nature of the "merger or consolidation" described in (h) (1) (A) where a corporation acquires a majority of the stock of another, and such is the nature of the "reorganization" described in (h) (1) (B) where a corporation transfers assets to another corporation and the transferor, or its stockholders, immediately thereafter are in control of the transferee. The words: "A recapitalization," in (h) (1) (C) and "A mere change in * * * form * * * of reorganization however effected" in (h) (1) (D) involve the same idea.

When Subdivision (h) (1) (A) included in its definition of "merger or consolidation" the "acquisition by one corporation of * * * substantially all the properties of another", it did this so that the receipt of property by the corporation surviving the merger might serve to effect a reorganization as does an acquisition of stock. Each transaction presupposed a continuance of interest on the part of the transferor in the properties transferred. Such a limitation inheres in the conventional meaning of

"merger and consolidation" and is implicit in almost every line of Section 203 which we have quoted. In *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 57 Fed. (2d) 188, the Court of Appeals of the Fifth Circuit decided that a transaction almost exactly like the present was not a "merger or consolidation" but a mere sale carrying no exemption. Judge Groner's opinion in *Corbett* v. *Burnett,* 50 Fed. (2d) 492, is in accord. In defining "reorganization", Section 203 of the Revenue Act gives the widest room for all kinds of changes in corporate structure but does not abandon the primary requisite that there must be some continuity of interest on the part of the transferor corporation or its stockholders in order to secure exemption. Reorganization presupposes continuance of business under modified corporate forms.

Furthermore the Cortland Company can not come within the exception to the general rule that gains realized from exchanges of property represent taxable income unless Sec. 203 (e) and Sec. 203 (e) (1) apply. Under those clauses, even if the transfer to Deyo was an exchange in pursuance of a "plan of reorganization" the property received by Cortland had to include *some* "stock or securities" (Sec. 203 (e)), or the exemption could not be had. As no stock was issued against the transfer, the conditions for an exemption were not fulfilled unless the notes, all payable within fourteen months of the date of the transfer, and all unsecured can be considered "securities" under Section 203 (e). Inasmuch as a transfer made entirely for cash would not be enough, it can not be supposed that anything so near to cash as these notes payable in so short a time and doubtless read-

ily marketable would meet the legislative requirements.

The very reason that Section 203 (e) requires that some of the property received in exchange should be *"stock or securities"* is to deprive a mere sale for cash of the benefits of an exemption and to require an amalgamation of the existing interests. There can be no justice or propriety in taxing one corporation who transfers its properties for cash and in relieving another that takes part of its pay in short time notes. The situation might be different had the "securities," though not in stock, created such obligations as to give creditors or others some assured participation in the properties of the transferee corporation. The word "securities" was used so as not to defeat the exemption in cases where the interest of the transferor was carried over to the new corporation in some form.

It seems unnecessary to say that the contract whereby Sargent went into the employment of Deyo for one year as manager in the business territory formerly occupied by Cortland did not place Cortland or its stockholders in control of Deyo in such a way as to effect a reorganization within the meaning of Section 203 (h) (1) (B).

The orders of the Board of Tax Appeals are affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Office Supreme Court
FILED
DEC 6 19
CHARLES ELMORE

FILE COPY

No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1932

PINELLAS ICE AND COLD STORAGE COMPANY,
PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument:	
I. The transaction was a sale of property for money, and not an exchange incident to a reorganization within the provisions of Section 203 of the Revenue Act of 1926, and the entire gain was taxable	7
II. In any event, the down payment was not distributed within the meaning of Section 203 (e) (1) and to that extent the gain is taxable	27
Conclusion	31
Appendix	33–41

CITATIONS

Cases:	
Atlantic Cleaners & Dyers, Inc., v. *United States*, 286 U. S. 427	20
Bowers v. *Lawyers Mortgage Co.*, 285 U. S. 182	7
Burnet v. *Logan*, 283 U. S. 404	11
Corbett v. *Burnet*, 50 F. (2d) 492	11
Cortland Specialty Co. v. *Commissioner*, 22 B. T. A. 808, affirmed, 60 F. (2d) 937	12, 14
Geary v. *Commissioner*, 6 B. T. A. 1109	12
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716	30
Prairie Oil & Gas Co. v. *Motter* (Kan.), decided September 17, 1932, Prentice Hall Federal Tax Service, 1932, Vol. 1, p. 2099.229	17
Preston v. *Keene*, 14 Pet. 133	11
Sarther Grocery Co. v. *Commissioner*, 22 B. T. A. 1273	12
United States v. *Shreveport Grain & Elevator Co.*, No. 19, October Term, 1932, decided November 7, 1932	23
Warner Co. v. *Commissioner*, decided October 19, 1932, 26 B. T. A	12
Williams v. *Commissioner*, 44 F. (2d) 467	27
Williamson v. *Berry*, 8 How. 495	11

Statute:

	Page
Revenue Act of 1926, c. 27, 44 Stat. 9, 10, 11, 12—	
Sec. 2 (U. S. C. Sup. V, Title 26, Sec. 1262)	33
Sec. 201 (U. S. C., Sup. V, Title 26, Sec. 931)	28
Sec. 202 (U. S. C. Sup. V, Title 26, Sec. 933)	33
Sec. 203 (U. S. C. Sup. V, Title 26, Sec. 934)	33–37
Miscellaneous:	
H. Rep. No. 179, 68th Cong., 1st Sess.—	
P. 15	23, 29
P. 16	24
H. Rep. No. 486, 67th Cong., 1st Sess., p. 17, Amendment No. 47	16
Senate Report No. 398, 68th Cong., 1st Sess.—	
P. 16	23
Pp. 17–18	24
Treasury Regulations 65—	
Article 1574	41
Article 1575	41
Treasury Regulations 69—	
Article 1574	37
Article 1575	39
I. T. 1410, I–2, C. B. 25	12
I. T. 2542, IX–2, C. B. 126 (December, 1930)	26
G. C. M. 8565, IX–2, C. B. 127 (December, 1930)	26
G. C. M. 7472, IX–1, C. B. 184 (June, 1930)	25
G. C. M. 3827, VII–2, C. B. 114 (December, 1928)	25
G. C. M. 3291, VII–2, C. B. 203 (June, 1928)	26
G. C. M. 2000, VI–2, C. B. 248 (December, 1927)	20, 26
G. C. M. 1753, VI–1, C. B. 138 (June, 1927)	26
G. C. M. 1977, VI–2, C. B. 168	12
Klein, *Federal Income Taxation*, Appendix D, pp. 303–304	24

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–22) is reported in 21 B. T. A. 425. The opinion of the Circuit Court of Appeals (R. 28–31) is reported in 57 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 29, 1932. (R. 31.) The petition for certiorari was filed June 27, 1932 (R. 32), and granted October 10, 1932. The jurisdiction of

this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, a corporation, transferred substantially all its property to another corporation in return for a cash down payment and deferred installments, the latter being evidenced by notes of the transferee secured by its bonds. The question is whether the petitioner is relieved from taxation on the gain realized from the transaction by the exceptions to Section 203 (a) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 33–41.

STATEMENT

The facts found by the Board of Tax Appeals (R. 13–19) may be summarized as follows:

Petitioner, a Florida corporation, was engaged in the manufacture and sale of ice. Substantially the same stockholders controlled it and the Citizens Ice & Cold Storage Company, a corporation engaged in the same business in the same locality. (R. 13.) The directors and stockholders of both companies were anxious to dispose of all the property of the two companies and then to discontinue business, dissolve the corporations, and distribute the proceeds. One Lewis, general manager of both companies, in 1926 began negotiations for the sale

of the business and property of the two companies. (R. 13.)

By written agreement of November 4, 1926, petitioner agreed to sell to the National Public Service Corporation more than 99% of its total property for $1,400,000, of which $400,000 was to be paid in 1926 and the remainder in installments during 1927. (R. 14–15, 19.) The purchaser agreed to form a new Florida corporation and to cause it to take title to the property sold. (R. 16.) The deferred installments of the purchase price were to be evidenced by notes of either the National Corporation or the new corporation, secured by the mortgage bonds of the new corporation or other satisfactory collateral. (R. 15–16.) An agreement of similar import was executed between the Citizens Company and the National Corporation. (R. 17.)

The National Corporation then organized the Florida West Coast Ice Company (R. 17), and on December 17, 1926, the transactions were closed. The petitioner and the Citizens Company delivered instruments of transfer made out to the Florida Company; cash was paid as provided; and notes of the Florida Company were given for the deferred installments. Bonds of the Florida Company secured by the properties acquired from the petitioner and the Citizens Company were given as collateral for the notes. The cash was used to pay the petitioner's creditors. The Citizens Company agreement was carried out at the same time. (R. 17–18.)

In January, 1927, pursuant to the plan theretofore made by the stockholders and directors of the petitioner (R. 18), formal resolutions for the winding up of petitioner's affairs, its dissolution and the distribution of its assets were adopted (R. 18). Similar action was taken by the Citizens Company. (R. 18.) When the Florida Company paid its notes to the petitioner, the proceeds were immediately distributed to its stockholders as liquidating dividends. After retaining a small sum to meet contingent liabilities, the remaining assets of the petitioner (less than 1%) were turned over to a holding company organized in 1927, as trustee for the petitioner's stockholders. (R. 18–19.)

The Commissioner determined that the petitioner was taxable on the profit of $552,144.12 which was realized on the transaction, and accordingly asserted the deficiency in question. (R. 6.) This action was upheld by the Board (R. 12–22) and the Circuit Court of Appeals (R. 28–31).

SUMMARY OF ARGUMENT

I

The purpose of the statute was to defer the recognition of gain or loss in any case where an exchange resulted merely in a change of form and not of substance, and all of its provisions should be interpreted to effectuate this underlying purpose. The statute first states the general rule that gain or loss on sales and exchanges shall be recognized.

The exceptions which follow deal solely with exchanges and not with sales. The transaction here involved was an outright sale and it is not therefore within any of the exceptions.

Furthermore, the transaction did not result in a reorganization within the meaning of the statute. In a reorganization under Section 203 (b) (1) (A) there must be some continuity of interest in the substantial ownership of the property involved. The notes received by petitioner clearly do not represent such a continuity of interest; therefore there was no reorganization.

The statute further requires that part of the consideration shall consist of stock or securities in another corporation a party to the reorganization. The purpose of this requirement was obviously to preserve a continuity of interest in the assets transferred, without which the interest of the transferor would be substantially changed. While the payment of part of the cash consideration in this case was deferred and represented by notes, it is clear that they do not preserve unchanged the petitioner's interest in the assets disposed of. Therefore they are not securities within the meaning of the statute.

The existence of a plan of reorganization is an essential requirement for the classification of a transaction as a tax-free exchange. Petitioner had no plan of reorganization. If there was any plan it was that of the transferee.

The statute further requires that the taxpayer shall be a party to the reorganization. This requirement, like the others, was not satisfied in this case.

The opinion of the court below is said to adopt a construction that a reorganization within the statute must be in connection with a technical merger or consolidation. We do not contend for that narrow construction, which is opposed to the administrative interpretation of the statute. In the light of the facts of this case the opinion below may be interpreted as based upon the lack of any continuity of interest such as exists in mergers or consolidations. But even if the court below in its opinion placed too narrow a construction upon the statute, its judgment was clearly right and should be affirmed.

II

The statute permits some cash to enter into a transaction without losing its character as an exchange, but it contemplates that either the corporation or its stockholders shall be taxable on the profit to the extent of the cash, depending upon whether or not the cash was "distributed." This plainly means distributed to stockholders. Petitioner received $400,000 in cash as a down payment and none of it was distributed to stockholders. Since it is clear that the profit on the transaction was in excess of $400,000, petitioner is taxable upon that amount of profit in any event.

ARGUMENT

I

THE TRANSACTION WAS A SALE OF PROPERTY FOR MONEY, AND NOT AN EXCHANGE INCIDENT TO A REORGANIZATION WITHIN THE PROVISIONS OF SECTION 203 OF THE REVENUE ACT OF 1926, AND THE ENTIRE GAIN WAS TAXABLE

Section 203 (a) of the Revenue Act of 1926 (*infra*, p. 33) provides that—

> Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

The transaction here involved was a disposition of property which admittedly produced a profit. There is no controversy with respect to the amount of the profit, the sole question being whether the petitioner is freed from taxation on it by the exceptions contained in other provisions of Section 203. It is, of course, well settled that one claiming an exemption from tax must bring himself squarely within the provisions of the statute under which he claims such exemption. The rule is equally applicable to a taxpayer who claims the benefit of exceptional treatment. *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 187.

The exemption on which the petitioner relies is contained in Section 203 (b) (3) as modified by Section 203 (e) (1). Section 203 (b) (3) (*infra*, pp. 33–34) provides that—

> No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

This provision is qualified by Section 203 (e) (1) (*infra*, pp. 35–36) which provides:

> If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—
>
> (1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, * * *.

The word "reorganization" as used in the section is defined in Section 203 (h) (1) (A) (*infra*, pp. 36–37) as follows:

> The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation) * * *.

From its terms it is plain that the purpose of the statute was to defer the recognition of gain or loss in any case where an exchange results merely in a change of form and not of substance. A corporate transaction may technically involve a sale or exchange and thus have the elements of a "closed" transaction without changing in substance the real ownership of the property involved. In such a case Congress has provided that no gain or loss shall be then recognized for tax purposes and the tax is postponed.[1]

An examination of the various provisions in Section 203 just mentioned shows that before a transaction may be treated as nontaxable the following conditions must have existed concurrently:

(1) The transaction must have been an "exchange" of property (rather than a "sale");

(2) There must have been a "reorganization" within the statutory definition;

(3) The consideration must have consisted solely of "stock or securities" in another corporation party to the reorganization, or partly of stock and securities and partly of "other property or money";

(4) There must have been a "plan of reorganization";

---

[1] If it is deemed necessary to resort to legislative history for light on the Congressional purpose, that supports our view of the purpose of the statute. See pp. 22–24, *infra*.

(5) The taxpayer must have been "a party to the reorganization"; and

(6) The "other property or money" must have been "distributed" by the taxpayer corporation "in pursuance of the plan of reorganization."

We believe that none of these essential facts existed in this case and that consequently the admitted profit from the transaction was taxable to the petitioner.

(1) *The transaction must have been an "exchange" of property.* We submit, as held by the court below, that a mere sale of corporate assets is not a tax-free exchange within the intent of the statute. The taxpayer here disposed of its assets for a consideration which was to be paid only in money. The contract expressly provides that the vendor "agrees to sell" and the purchaser "agrees to purchase" the assets "for the sum of $1,400,000, payable as hereinafter provided." (R. 14.) The terms of payment are specified to be: "$400,000 in cash" on the date of closing, and the "balance of the purchase price, to wit: $1,000,000 shall be paid by the Purchaser to the Vendor" in installments of $500,000 on or before the 31st day of January, 1927, $250,000 on or before the 1st day of March, 1927, and $250,000 on or before the 1st day of April, 1927. The contract then provides that "The deferred installments of the purchase price above mentioned shall be *evidenced*" by 6% notes of the proposed Florida corporation, *secured* by the deposit as collateral

of mortgage bonds of such Florida corporation, or by "other collateral satisfactory to the Vendor." (Italics ours.) (R. 15.) In closing the transaction on December 17, 1926, these provisions of the contract appear to have been carried out in their entirety, except that the last installment of $250,000 was evidenced by two notes of $150,000 and $100,000, respectively, on account of the necessity of removing a cloud on the title to one of the properties. These notes were paid on or before their due dates, except the one for $100,000 which was paid in November, 1927, after the flaw in the title had been cleared up. (R. 18.)

Under familiar definitions of "sale" and "exchange," this transaction was clearly a sale and not an exchange. Both the form and the substance of the transaction require that conclusion. See *Williamson* v. *Berry,* 8 How. 495, 544; *Preston* v. *Keene,* 14 Pet. 133, 137; *Burnet* v. *Logan,* 283 U. S. 404, 412; *Corbett* v. *Burnet,* 50 F. (2d) 492 (App. D. C.).

The Board of Tax Appeals held this transaction to be a sale for money and not an exchange for securities within the meaning of the statute. The Circuit Court of Appeals apparently considered that the transaction was a sale and not an exchange, and we submit that the decision below may be adequately rested on that ground alone. It is clear, we submit, that Congress did not intend to postpone recognition of the gain derived from the sale of property for cash as distinguished from an ex-

change of property for stock or securities. The profit was then actually realized and no policy to base the tax on substance instead of form dictated that its taxation should be deferred. Although Section 203(e) permits some cash to enter into a transaction without causing it to lose its character as an exchange, Section 203(a) provides that the gain or loss shall be recognized from a "sale or exchange" and the exceptions which follow relate only to exchanges and in no case to sales. The distinction made in the statute between sales and exchanges should be preserved. The requirement that stock or securities in addition to cash or other property be received in exchange for the transfer of the assets is retained in the regulations. See Treasury Regulations 65 and 69, Article 1574. There is no regulation which provides that a transfer in return for cash alone is exempted from taxation by Section 203. The Board of Tax Appeals has consistently held that sales for cash are not among the exceptional cases in which the recognition of gain or loss is postponed. *Geary* v. *Commissioner,* 6 B. T. A. 1109; *Sarther Grocery Co.* v. *Commissioner,* 22 B. T. A. 1273; *Cortland Specialty Co.* v. *Commissioner,* 22 B. T. A. 808, affirmed, 60 F. (2d) 937 (C. C. A. 2d); *Warner Company* v. *Commissioner,* decided October 19, 1932, 26 B. T. A. —. See also I. T. 1410, I–2 Cumulative Bulletin 25 (December, 1922); G. C. M. 1977, VI–2 Cumulative Bulletin 168 (December, 1927).

Cortland Specialty Co. v. *Commissioner,* 60 F. (2d) 937 (C. C. A. 2d), pending on petition for certiorari, No. 482, October Term, 1932, directly supports our contention. It was there held that the term "reorganization" "does not properly embrace mere purchases by one company of the assets of another," and that "A sale of the assets of one corporation to another for cash without the retention of any interest by the seller in the purchaser is quite outside the objects of merger and consolidation statutes," and that Section 203 of the Revenue Act of 1926 "must be interpreted in this setting."

(2) *"Reorganization."*—Although the Circuit Court of Appeals in this case apparently considered that the transaction was a sale and not an exchange, it also pointed out that a "reorganization" is an essential element in any transaction which constitutes a tax-free exchange, and that although here there was an acquisition by one corporation of substantially all the property of the other, there was no reorganization because the transaction was not a merger or consolidation as those words are generally understood. It is not clear whether the court intended to hold that the statute requires a merger or consolidation in the technical sense or whether the effect of its decision is that there must be merely a continuity of interest. It said (R. 31):

> It must be assumed that in adopting paragraph (h) Congress intended to use the

> words "merger" and "consolidation" in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point.

The reference to clause B of Section 203 (h) (1) which recognizes as a reorganization "a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred" indicates that the purport of the decision is that the statute requires that the transferor shall retain some interest in the property transferred. This construction, we submit, is correct. The statute was not designed to make tax free any transaction unless there was some continuity of interest in the substantial ownership of the property involved.

This construction is supported by the decision in *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937, *supra,* where the court said (p. 940):

> Its purpose was to relieve those interested in corporations from profits taxes in cases where there was only a change in the corporate form in which business was conducted without an actual realization of any gain

from an exchange of properties. When describing the kind of change in corporate structure that permits exemption from these taxes, section 203 does not disregard the necessity of continuity of interests under modified corporate forms. Such is the purpose of the word "reorganization" in section 203 (b) (3) of the act, where a corporation exchanges its property "solely for stock or securities." Such also is the nature of the "merger or consolidation" described in subdivision (h) (1) (A) where a corporation acquires a majority of the stock of another, and such is the nature of the "reorganization" described in subdivision (h) (1) (B) of section 203, where a corporation transfers assets to another corporation and the transferor, or its stockholders, immediately thereafter are in control of the transferee. The words: "A recapitalization," in subdivision (h) (1) (C) of section 203, and "A mere change in * * * form * * * of organization, however effected," in subdivision (h) (1) (D) of section 203, involve the same idea.

Moreover, such a construction carries out the general theory of the statute, for while Section 203 permits the gain from a tax-free exchange to be temporarily ignored, Section 204 requires that the new property received shall be considered as taking the place of the old property given in exchange, for the purpose of determining the gain or loss from a subsequent sale.

149190—32——3

We think the decision below should be construed to harmonize with these views, but the possibility that the decision might be interpreted to hold that there can be no reorganization within the meaning of this statute without a merger or consolidation in the technical sense has caused some concern, for the reason that the administrative construction of the statute has not so restricted it. We are informed that the consistent administrative construction of Section 203 (h) (1) (A) by the Treasury Department has always been that the acquisition of substantially all the property of a corporation (even though not amounting to a merger or consolidation) is a "reorganization" within the statute, provided the transaction meets the other statutory requirements. In thus administering the statute the Treasury Department has construed the parenthetical clause of Section 203 (h) (1) (A) as enlarging for the purpose of the statute the commonly understood meaning of "merger or consolidation" and thus bringing some transactions within the term "reorganization" which technically are not mergers or consolidations.[2] That seems to be its natural meaning and this construction is strengthened by the definition of the term "including" in

[2] The definition of the term "reorganization" first appeared in Section 202 (c) (2) of the Revenue Act of 1921, and the legislative history shows that the parenthetical clause was added by the Senate apparently for the purpose of enlarging the definition. (H. Rep. 486, 67th Cong., 1st Sess., p. 17, Amendment No. 47.)

Section 2 (b) of the Act (*infra*, p. 33), which indicates that it is not to be given a restrictive application.[3] Since the decision below can not be given the effect of excluding from the term "reorganization" all transactions which technically are not mergers or consolidations, without disregarding the parenthetical clause, we think the interpretation of the decision which we have suggested above is to be preferred.

(3) "*Stock or securities.*"—This construction of the statute is likewise consistent with the requirement of Section 203 that the consideration shall include stock or securities in another corporation which is a party to the reorganization. The Board of Tax Appeals held that the notes in this case did not constitute "securities" within the

[3] In *Prairie Oil & Gas Co.* v. *Motter*, D. Kan., decided September 17, 1932, not yet officially reported, Prentice Hall Federal Tax Service, 1932, vol. 1, p. 2099.229, it was held that the word "including" in Section 203 (h) (1) (A) is a word of enlargement rather than a word of limitation.

The decision in the *Prairie Oil & Gas case* is in no way inconsistent with our position as to what constitutes a reorganization. The Prairie Oil & Gas Co. purchased all of the stock of the Olean Petroleum Co., and the next day dissolved the Olean Co. and assumed direct ownership of its assets. There was thus a complete continuity of ownership, and a reorganization within the definition of the statute. We do not rely on the decision in so far as it may be regarded as holding that a transfer of stock or assets for cash meets the requirement of the statute that an exchange is a necessary element of a tax-free transaction, nor was that contention made in the District Court by the Government.

meaning of the statute, because the statute clearly contemplated something different from purchase price obligations. In the *Cortland Specialty Company case, supra,* it was likewise held that a series of unsecured notes all payable within fourteen months from the transfer were not securities within the meaning of Section 203, the court saying (p. 940):

> The very reason that section 203(e) requires that some of the property received in exchange should be "*stock or securities*" is to deprive a mere sale for cash of the benefits of an exemption and to require an amalgamation of the existing interests. * * * The word "securities" was used so as not to defeat the exemption in cases where the interest of the transferor was carried over to the new corporation in some form.

The notes in the instant case were secured by bonds of the Forida West Coast Ice Company, which were secured by the properties acquired by that company from petitioner and the Citizens Company. (R. 18.) The terms of the bonds do not appear. Assuming for present purposes that some types of bonds would be "securities" within the meaning of the statute, petitioner did not own the bonds, and its interest in the assets which secured them had changed substantially. Its right to look to the bonds and ultimately to the entire property of the obligor in the event that the notes were not paid

was quite different from its right as owner of its own property. Moreover, under the sales agreement different collateral could have been given (R. 15), and it was only in the event that Florida West Coast Ice Company bonds were pledged that petitioner would have had even this remote connection with the property it was selling. Accordingly, even assuming that petitioner can be said to have had a plan of reorganization, it was no necessary part of that plan that petitioner should continue to have any interest whatsoever in the property of which it was disposing. It is implicit in the statute that the transaction shall result merely in a change of form and not in one of substance and that the corporation which has transferred its assets shall receive stock or securities which represent a continuing interest in the assets which have been transferred. Clearly, the notes in this case did not represent any interest of this character.

The conclusion that the notes in the instant case were not "securities" within the meaning of the statute does not imply that the term "securities" may not include bonds and similar obligations of the transferee corporation. While we believe that the term as used in Section 203 should, in general, be construed as limited to obligations which are a part of the permanent financial structure of the transferee corporation, such as long-term bonds, it is unnecessary for present purposes to determine

the full scope of the term. We believe that it should not be extended to include mere purchase money obligations, even though these obligations are secured by bonds of the purchaser. There is a substantial difference between the interest represented by a long-term bond, involving a permanent investment in the business, and a purchase money obligation which the transferor intends to and does liquidate in a comparatively short time, without any concern for the future operation of the property as a business.[4] We submit that the purpose of Congress to ignore for tax purposes transactions which result merely in a change of form should not be extended to include this transaction, where the petitioner has parted with all permanent proprietary interest in the property disposed of.

(4) *"Plan of reorganization."*—The record contains no express finding that the transfer of the petitioner's assets in this case was pursuant to any "plan of reorganization." If there was any plan of reorganization it was not the petitioner's plan. The Fitkin interests desired to acquire the business

[4] Our contention that purchase money notes are not "securities" is of course limited to situations arising under the reorganization provisions. In construing statutes having a different purpose it may well be that notes should be regarded as securities, and the Bureau of Internal Revenue has so held in G. C. M. 2000, VI–2 C. B. 248. This Court has recently pointed out that the same word may have different meanings when used more than once, even in the same section of the statute. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433.

of the petitioner and another company. (R. 13.) Their interests, not the taxpayer, caused the formation of a corporation to take title to the latter's property. (R. 16.) The petitioner's plan, so far as it had any, was that its affairs would be wound up, its assets distributed, and that it would be dissolved. (R. 13–14.) While undoubtedly the statute does not require a formal "plan of reorganization" such as is often prepared in a corporate reorganization, there apparently was no plan of reorganization, formal or informal, in which petitioner was directly involved. Of course, the fact that the statute might be satisfied by an informal plan does not justify disregarding that requirement of the statute here where, apparently, there was no "plan of reorganization" at all.

(5) *"Party to the reorganization."*—If there was no reorganization within the meaning of the statute, then, of course, the petitioner was not a party to a reorganization.

Furthermore, the statute includes a definition of the term "a party to a reorganization" which, while not exclusive, is nevertheless significant so far as the present situation is concerned. Section 203 (h) (2) provides as follows:

> The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number

of shares of all other classes of stock of another corporation.

It will be noted that the definition specifically includes both parties in the case of one of the transactions mentioned in Section 203 (h) (1) (A) but does not refer to the transaction which covers this case. Section 203 (h) (1) (A), in the parenthetical clause, deals with two transactions, namely, (1) the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, and (2) the acquisition by one corporation of substantially all the properties of another. Section 203(h)(2) provides that in the case of the first transaction both corporations shall be deemed to be parties to the reorganization, but it is silent as to whether both corporations in the second transaction are to be deemed parties to the reorganization.

In our view (1) there was no "exchange" of property, (2) there was no "reorganization" within the statutory definition, (3) the consideration did not include any stock or securities in another corporation, a party to the reorganization, and (4) there was no "plan of reorganization." Since these four conditions of the statute are not satisfied we think it is clear that the case does not fall under any of the exceptions in Section 203 and therefore that Section 203 (a) requires that the gain be recognized.

The language of the statute seems to us so clear that we do not believe that a resort to legislative history for light on its meaning or the purpose of Congress is necessary. See *United States* v. *Shreveport Grain & Elevator Co.*, No. 19, October Term, 1932, decided November 7, 1932. But the petitioner has quoted at length from the Statement of Changes Made in the Revenue Act of 1921, which was prepared by the Treasury Department when the Revenue Bill of 1924 was being drafted.[5] It is true that there is language in this Statement which supports the view that a transfer of assets for cash may be nontaxable. But it does not appear that this report was accepted by either the Senate or House. The paragraph quoted by the petitioner (Br. 13), which contains the language most favorable to its position, was not incorporated in the House or Senate Committee reports. And the House and Senate Committee reports themselves show that Congress took the contrary view by limiting Section 203 (e) (1) to transfers "for stock and securities * * * *and* cash." (House Report No. 179, 68th Cong., 1st Sess., p. 15; Senate Report No. 398, 68th Cong., 1st Sess., p. 16; italics ours.)

Furthermore, the Statement of Changes upon which the petitioner relies, stated in discussing Section 204, relating to the basis for determining gain

[5] The reorganization provisions of the 1926 Act are in substance the same as those in the 1924 Act, to which the material here referred to relates.

or loss (see Klein, Federal Income Taxation, Appendix D, pp. 303–304):

> The provisions of section 203 of the draft that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended. These provisions are based upon the theory that the types of exchanges specified in section 203 are merely *changes in form and not in substance* and consequently should not be considered as affecting a realization of income at the time of the exchange. In other words, these provisions result not in an exemption from tax but in a postponement of tax *until the gain is realized by a pure sale* or by such an exchange as amounts to a pure sale. (Italics ours.)

This identical language was adopted in both the House and Senate Reports. (House Report No. 179, 68th Cong., 1st Sess., p. 16; Senate Report No. 398, 68th Cong., 1st Sess., pp. 17–18.)

The language thus adopted by the Committees shows plainly the intention of Congress that a transaction such as that involved in the present case shall not be exempt from tax. The outright sale of assets does not fall within the requirement that Section 203 applies only to "changes in form and not in substance;" and here the gain has been "realized by a pure sale" so that there is no occasion for a "postponement of tax."

Nor is there anything in the regulations to support the petitioner's position. The petitioner

prints twice (Br. 21–22, 31–32) a partial quotation from Article 1574 of Regulations 65 and 69, and this partial quotation read apart from its setting does seem to lend some aid to the petitioner's contentions. But when Article 1574 is examined in its entirety (see *infra*, pp. 37–39), it is clear that it relates only to transfers for which the sole consideration is stock or securities. The provision of the regulations which deals with transfers in consideration of "stock or securities * * * *and* other property or money" (italics ours) is Article 1575 of Regulations 69 (*infra*, pp. 39–41). Article 1575 provides that transfers of property in return for stock or securities *and* other property or money, where all the other conditions of the statute are satisfied, are nontaxable if the other property or money received is distributed pursuant to the plan of reorganization. There is no regulation which provides that an outright sale is exempted from taxation by Section 203.

The petitioner is not helped by any of the several administrative rulings, which it cites, and from which it quotes. In G. C. M. 3827, VII–2 Cumulative Bulletin 114 (December, 1928), the consideration received by the taxpayer in exchange for its business included preferred stock as well as cash. In the transaction involved in G. C. M. 7472, IX–1 Cumulative Bulletin 184 (June, 1930), the only consideration received by the taxpayer in exchange for its assets was stock. In I. T. 2542,

IX-2 Cumulative Bulletin 126 (December, 1930), stock of the taxpayer was exchanged for stock in another corporation. In G. C. M. 8565, IX-2 Cumulative Bulletin 127 (December, 1930), the gain upon the transaction was held taxable. In G. C. M. 1753, VI-1 Cumulative Bulletin 138 (June, 1927), the sole consideration received by the taxpayer in exchange for its assets was stock. While G. C. M. 2000, VI-2 Cumulative Bulletin 248 (December, 1927), held farmers' mortgage notes to be securities under the Federal Farm Loan Act, the question arose under Section 234 (a) (2) of the Revenue Act of 1921 (relating to the deduction from a corporation's gross income of interest on indebtedness incurred "to purchase or carry obligations or securities * * * the interest upon which is wholly exempt from taxation"), a question which obviously has no connection with the proper construction of Section 203 of the Revenue Act of 1926. In G. C. M. 3291, VII-1 Cumulative Bulletin 203 (June, 1928), stock in one corporation was exchanged for stock and debenture notes in another.

The petitioner has printed in its brief quotations from each of these administrative rulings. Considered apart from their context and isolated from the facts to which they apply, they appear to lend support to petitioner's argument which is lacking upon examination of the rulings in their entirety. As we have shown, none of these administrative rulings involve the question presented in this case.

Petitioner also relies on *Williams* v. *Commissioner,* 44 F. (2d) 467 (C. C. A. 8th), which is cited as in direct conflict with the decision below. An examination of the opinion shows that it did not deal with the subject of "reorganization" and it clearly has no bearing on the problem presented here. The taxpayer involved, a stockholder, was held taxable on the transaction there considered.

II

IN ANY EVENT, THE DOWN PAYMENT WAS NOT DISTRIBUTED WITHIN THE MEANING OF SECTION 203(e)(1) AND TO THAT EXTENT THE GAIN IS TAXABLE

Assuming for the purpose of argument that the transaction in question satisfied all of the requirements of the statute heretofore discussed, there still remains for consideration the question of the taxability of the down payment of $400,000 in cash. Section 203(e) of the Act (*infra,* pp. 35–36) provides that even though a transaction would otherwise be one on which no gain is to be recognized, if part of the consideration received is money the gain shall be recognized in an amount not exceeding the amount of cash received—

> If the corporation receiving such * * * money does not distribute it in pursuance of the plan of reorganization, * * *.

We submit that the word "distribute" as used in this statute does not cover the payment of the corporation's debts, but means a distribution to the

stockholders of the corporation. The findings show that no part of the cash payment of $400,000 was distributed to the petitioner's stockholders; it was used in its entirety for the payment and discharge of debts and obligations of the taxpayer. (R. 16–18.) A creditor who gives up his claim against the corporation receives "payment," not a "distribution."

Bearing in mind that the entity making the distribution is the corporation itself, it would appear that the usual and ordinary meaning of the word "distribute" would be to pay money or transfer property ratably among the stockholders of the corporation. Section 201 of the same statute defines the term "dividend" as a "distribution made by a corporation to its shareholders." The fact that Section 203 (g) provides that a distribution of stock or securities in pursuance of a reorganization shall not be considered as a distribution within the meaning of Section 201 without mentioning a distribution of money is persuasive that Section 203 deals with the same sort of distribution as Section 201. This appears to be the "adequate provision" made in the statute for cases in which income is actually realized by the stockholders, which is referred to in Article 1574 of Treasury Regulations 69 (*infra*, p. 39).

Consideration of the purpose of the statute also strongly indicates that the payment of the selling corporation's debts is not a "distribution." When

there is a reorganization and the corporation is a mere conduit to pass the gain realized on to stockholders, then the stockholders are taxed on the gain. But when the proceeds of the sale are retained by the corporation and used for corporate purposes, the corporation itself has realized the gain; it is not a mere conduit to pass on the gain to the stockholders, and the profit will escape taxation unless it is taxed to the corporation. The payment of corporate debts is obviously a corporate purpose. So much of the profit from the sale as is used in the payment of debts will never be taxed unless it is taxed to the corporation, for it never reaches the stockholders, and it is not taxable as such to the creditors.

A reference to the Committee Reports in connection with the Revenue Act of 1924 shows unmistakably the legislative intent to limit the word "distribute" to payments of money or transfers of property to the stockholders of the corporation making the distribution. H. Rep. No. 179, 68th Cong., 1st Sess., p. 15, contains the following:

> Section 203 (e): There is no provision of the existing law which corresponds to subdivision (e) of the bill, nor has the Treasury Department ever ruled officially on the type of case covered by that subdivision. The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities

> of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash *to its stockholders.* But if the selling corporation fails to distribute the cash *to its stockholders* then the gain or loss is to be recognized. In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a *conduit* in passing the proceeds of the sale on *to its stockholders,* no gain to the corporation is to be recognized, but if it retains all or any of the proceeds with the result that the transaction is in substance a real sale, then all or a part of the gain shall be recognized. (Italics ours.)

Thus even where the whole gain from a reorganization is not to be recognized for tax purposes (because of the receipt and distribution of stock or securities), it seems quite clear that Congress intended that any cash received in the transaction was to be taxed either to the corporation or to the stockholders, depending upon whether or not the cash was distributed to the stockholders.

While part of the cash was paid directly to creditors of the petitioner, these payments for its benefit are the equivalent of actual receipt by the petitioner. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716. There is no dispute that the profit from this transaction exceeded $400,000. Therefore, under Section 203 (e) (2) it would be necessary in any event to recognize that amount of gain as subject to tax.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

DECEMBER, 1932.

APPENDIX

The Revenue Act of 1926, c. 27, 44 Stat. 9, 11, 12, provides in part an follows:

SEC. 2. (a) When used in this Act—

* * * * *

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined. (U. S. C. Sup. V, Title 26, Sec. 1262.)

SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

* * * * *

(U. S. C. Sup. V, Title 26, Sec. 933.)

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade

or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(c) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such

paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(f) If an exchange would be within the provisions of paragraph (1), (2), (3), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(g) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of section 201 for the purpose of determining the taxability of subsequent distributions by the corporation.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least

a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation. (U. S. C. Sup. V, Title 26, Sec. 934.)

Regulations 69, promulgated August 28, 1926, under the Revenue Act of 1926, contained the following provisions:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests, either of the shareholders or of the corporations, may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized if, in pursuance of a

plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. If two or more corporations reorganize, for example, by—

(1) The dissolution of corporation B and the sale of its assets to corporation A,

(2) The sale of its property by B to A,

(3) The sale of the stock of B to A,

(4) The merger of B into A,

(5) The consolidation of A and B,

(6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or

(7) The transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets in stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B.

Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B, and corporation A distributes to its shareholders the stock of corporation B, no taxable income is realized by the shareholders

from the receipt of such stock. (See article 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them, and that the assets acquired by a corporation a party to the reorganization shall have the same basis for determining depletion, exhaustion, wear and tear, obsolescence, and gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See articles 1596–1598.)

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See article 1575.) While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

ART. 1575.—*Exchanges in reorganizations for stock or securities and other property or money.*—If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged for stock or securities in such cor-

poration or in another corporation a party to the reorganization and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property. No loss from such an exchange will be recognized, however. (See section 203(f).) If a distribution of property or money in the course of a reorganization is otherwise within the provisions of this paragraph, but has the effect of the distribution of a taxable dividend, there shall be taxed to each distributee (1) as a dividend, such an amount of the gain recognized under this paragraph as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and (2) as a gain from the exchange of property, the remainder of the gain recognized under this paragraph.

Examples.—(1) A, in connection with a reorganization, exchanges in 1925 a share of stock in the X company, purchased in 1918 for $100, for (a) a share of stock in the Y company a party to the reorganization, which has a fair market value of $90, and (b) $20 cash. The gain from the transaction, $10, is recognized and taxed to A. See article 1596 for the basis for determining gain or loss from a subsequent sale.

(2) The X corporation has a capital of $100,000 and earnings and profits of $50,000 accumulated since February 28, 1913. The X corporation in 1925 transfers all its assets to the Y corporation in exchange for the issuance of all Y's stock and the payment of $50,000 in cash to the shareholders of corporation X. A, who owns one share of stock in X, for which he paid $100, receives a share of stock in Y worth $100 and in

addition $50 in cash. A will be liable to the surtax on $50.

If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized. If the other property or money received by the corporation is not distributed by it pursuant to the plan of reorganization, the gain, if any, to the corporation from the exchange will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property so received which is not distributed. In either case no loss from the exchange will be recognized. (See section 203 (f).)

Articles 1574 and 1575 of Regulations 65, issued under the 1924 Act, are substantially the same so far as here relevant as Articles 1574 and 1575 of Regulations 69, set out above.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 182.—October Term, 1932.

Pinellas Ice and Cold Storage Company, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 9, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner, a Florida corporation, made and sold ice at St. Petersburg. Substantially the same stockholders owned the Citizens Ice and Cold Storage Company, engaged in like business at the same place. In February, 1926, Lewis, general manager of both companies began negotiations for the sale of their properties to the National Public Service Corporation. Their directors and stockholders were anxious to sell, distribute the assets and dissolve the corporations. The prospective vendee desired to acquire the properties of both companies, but not of one without the other.

In October, 1926, agreement was reached and the vendor's directors again approved the plan for distribution and dissolution. In November, 1926, petitioner and the National Corporation entered into a formal written contract conditioned upon a like one by the Citizens Company. This referred to petitioner as "vendor" and the National Corporation as "purchaser". The former agreed to sell, the latter to purchase the physical property, plants, etc., "together with the goodwill of the business, free and clear of all defects, liens, encumbrances, taxes and assessments for the sum of $1,400,000, payable as hereinafter provided." The specified date and place for consummation were eleven A. M., December 15, 1926, and 165 Broadway, New York City, when "the vendor shall deliver to the purchaser instruments of conveyance and transfer by general warranty in form satisfactory to the purchaser of the property set forth . . . . The purchaser shall pay to the vendor the sum of $400,000.00 in cash." The balance of the purchase price ($1,000,000.00) shall be paid $500,000.00 on or before

January 31, 1927; $250,000.00 on or before March 1, 1927; $250,000.00 on or before April 1st, 1927. Also, the deferred installments of the purchase price shall be evidenced by the purchaser's 6% notes, secured either by notes or bonds of the Florida West Coast Ice Company, thereafter to be organized to take title, or other satisfactory collateral; or by 6% notes of such Florida company secured by first lien on the property conveyed, or other satisfactory collateral.

The vendor agreed to procure undertakings by E. T. Lewis and Leon D. Lewis not to engage in manufacturing or selling ice in Pinellas County, Florida, for ten years.

The $400,000 cash payment was necessary for discharge of debts, liens, encumbrances, etc. The Florida Company, incorporated December 6, 1926, took title to the property and executed the purchase notes secured as agreed. These were paid at or before maturity except the one for $100,000, held until November, 1927, because of flaw in a title. As the notes were paid petitioner immediately distributed the proceeds to its stockholders according to the plan.

The property conveyed to the Florida Company included all of petitioner's assets except a few vacant lots worth not more than $10,000, some accounts—$3,000 face value—also, a small amount of cash. Assets, not exceeding 1% of the whole, were transferred to the Citizens Holding Corporation as trustee for petitioner's stockholders—99% of all vendor's property went to the Florida Company. The plan of the whole arrangement as carried out was accepted by petitioner's officers and stockholders prior to November 4, 1926.

The Commissioner of Internal Revenue determined that the petitioner derived taxable gain exceeding $500,000 and assessed it accordingly under the Act of 1926. The Board of Tax Appeals and the Circuit Court of Appeals approved this action.

The facts are not in controversy. The gain is admitted; but it is said this was definitely exempted from taxation by Section 203, Revenue Act of 1926.

The Act, approved February 26, 1926, c. 27, 44 Stat. 9, 11, 12,—

> Sec. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and

the loss shall be the excess of such basis over the amount realized.

(b) . . . . . .

(c) The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

(e) . . . . . .

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) and (2) . . . . . .

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) and (5) . . . . . .

(c) and (d) . . . . . .

(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

. . . . . .

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

All of Sec. 203 (b) is in the margin.*

Counsel for the petitioner maintain—

The record discloses a "reorganization" to which petitioner was party and a preliminary plan strictly pursued. The Florida West Coast Ice Company acquired substantially all of petitioner's

*Sec. 203 (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization,

property in exchange for cash and securities which were promptly distributed to the latter's stockholders. Consequently, under Section 203, the admitted gain was not taxable.

The Board of Tax Appeals held that the transaction in question amounted to a sale of petitioner's property for money and not an exchange for securities within the true meaning of the statute. It, accordingly and as we think properly, upheld the Commissioner's action.

The "vendor" agreed "to sell" and "the purchaser" agreed "to purchase" certain described property for a definite sum of money. Part of this sum was paid in cash; for the balance the purchaser executed three promissory notes, secured by the deposit of mortgage bonds, payable, with interest, in about forty-five, seventy-five, and one hundred and five days, respectively. These notes—mere evidence of obligation to pay the purchase price—were not securities within the intendment of the act and were properly regarded as the equivalent of cash. It would require clear language to lead us to conclude that Congress intended to grant exemption to one who sells property and for the purchase price accepts well secured, short term notes, (all payable within four months) when another who makes a like sale and receives cash certainly would be taxed. We can discover no good basis in reason for the contrary

---

solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(5) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

view and its acceptance would make evasion of taxation very easy. In substance the petitioner sold for the equivalent of cash; the gain must be recognized.

The court below held that the facts disclosed failed to show a "reorganization" within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause A, paragraph (h) (1), Section 203, we think is too narrow. It conflicts with established practice of the tax officers and if passed without comment, may produce perplexity.

The court said—"It must be assumed that in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point."

The paragraph in question directs—"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),". The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short term purchase money notes. This general view is adopted and well sustained in *Cortland Specialty Co.* v. *Commissioner of Internal Revenue,* 60 F. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed.

The judgment of the court below is affirmed.